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IN THE

Circuit Court of the United States

FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

UNITED STATES OF AMERICA, Petitioner,

vs.

STANDARD OIL COMPANY OF NEW JERSEY, et al., Defendants.

DEFENDANTS' BRIEF ON THE LAW.

D. T. WATSON,
JOHN M. FREEMAN,
ERNEST C. IRWIN,
For Respondents.

Smith Bros. Co. Inc., Franklin Print, 412 Grant Street, Pittsburg.

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PURPOSE OF THE BRIEF.

It is to show:

First. That the government has *failed* to maintain the affirmative of the issue made by the pleadings, and to prove that the seven individual defendants, as a matter of fact, were, when the Petition was filed, in control and management of and dictated to the other defendants in the Bill in restraining interstate trade or attempting to monopolize any portion of the same in crude petroleum and its products, contrary to the provisions of the Sherman Act.

Second. All the evidence in the case merely demonstrates the following:

The Rockefellers began in 1862 and within a few years were joined by the other individual defendants engaged in the then new, unique and uncertain petroleum industry. Beginning in, say, 1870, the individual defendants jointly engaged in the oil industry. By their skill, industry and management they greatly enlarged their business, and when the Sherman Act was passed they were the owners of various refineries, producing oil wells and pipe lines, and they were then largely engaged in the interstate and foreign trade in oil.

That when the Sherman Act was passed, the defendants were in the ownership and control of a non-competitive group of different parcels of property, such as pipe lines, refineries, producing oil wells, storage tanks and ships, used by them in local and, to some extent, in interstate and foreign trade. After the Sherman Act was passed, the defendants continued to manage and control and use this non-com-

petitive group using the products, *i. e.*, refined oil and its by-products in such interstate and foreign trade and fiercely competed for such interstate and foreign trade in petroleum and its products. The defendants did, to a comparatively small extent, add to the original group other pieces of like property after the Sherman Act was passed, and they used its products also in, to some extent, this competition for interstate and foreign trade, and when the petition was filed they were then and have continued to so use such property, and, with its aid, to compete for the interstate trade and export trade in crude oil and its products.

The unique and unparalleled features of the oil industry—its hazards and risks—the uncertainty of the quantity of such oil produced or the place where it would be produced —the necessity of its immediate transportation and storing when produced—the necessity of the construction of pipe lines connecting with producing wells and refineries, and a vast system of reservoirs to store all the oil—these and other things made it an economic necessity that one or more large and powerful groups of individuals should invest vast sums of money to foster and develop it, and this is what the defendants did.

The testimony does show fierce competition by the defendants, but it does *not* show that they restrained by contract or agreement or conspiracy interstate trade, or that they, *by unlawful means,* sought to gain a monopoly of such trade or any part thereof. On this, the Government's case has utterly failed.

Third. When the petition was filed, the defendants were not engaged in or doing that which was a violation of the Sherman Act, but were only engaged in a lawful business, and were earnestly competing for a large portion of the interstate and export trade in crude petroleum and its pro-

ducts; and such efforts and competition, carried on to the fiercest extent, is not a violation of the Sherman Act.

The issue in this case is definitely limited to the time when the petition was filed. It does not involve any matters or things done prior to the passage of the Sherman Law, nor indeed any matter or thing which was not in active continuous operation when the petition in this case was filed. To seriously discuss the matters and things done prior to the passage of the Sherman Act, or long prior to the filing of the petition, is to unnecessarily burden the case and weary the court, for no matter what may be the conclusions as to such other matters and things, the decision must be solely on the issue *confined to the date of the filing of the petition.*

Fourth. That the Trust Agreements of 1879 and 1882, and the Standard Oil Company of New Jersey, were mere methods used by persons jointly holding non-competitive properties to more conveniently handle and manage the same, and that, being mere methods of management of a common ownership of noncompetitive groups of properties neither the Trust Agreement nor the conveyance to the Standard Oil Company of New Jersey constituted a combination in restraint of trade or tended to a monopoly under the Sherman Act. The attempt of the Government in closing its argument to allege that these non-competitive groups became competitive after 1892, and to cite the testimony of Mr. Rockefeller in support thereof is

(a) To flatly contradict the Government's case as made in its petition alleging to the contrary; and,

(b) To overlook the consideration of Mr. Rockefeller's entire testimony on that question.

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UNITED STATES OF AMERICA Petitioner,

vs.

STANDARD OIL COMPANY OF NEW JERSEY, et al. Defendants.

BRIEF ON BEHALF OF THE DEFENDANTS.

FIRST.

THE GOVERNMENT HAS FAILED TO MAINTAIN THE AFFIRMATIVE OF THE ISSUE MADE BY THE PLEADINGS, AND TO PROVE THAT THE SEVEN INDIVIDUAL DEFENDANTS, AS A MATTER OF FACT, WERE, WHEN THE PETITION WAS FILED, IN CONTROL AND MANAGEMENT OF AND DICTATED TO THE OTHER DEFENDANTS IN THE BILL IN AN EFFORT TO RESTRAIN INTERSTATE TRADE OR MONOPOLIZE ANY PORTION OF THE SAME IN CRUDE PETROLEUM AND ITS PRODUCTS, CONTRARY TO THE PROVISIONS OF THE SHERMAN ACT.

It is a familiar rule that when the sovereign, either the State or the United States, comes into a court as a suitor, she stands exactly as the citizen with whom she disputes, and can claim no other or higher or greater privileges than that citizen. She is governed by the same rules of law and equity that govern the citizen. She is subject to the rules of pleading, not perhaps in a proceeding like this under the Sherman Act to common law precision, but still she is subject to those rules of pleading which imperatively require that the Petition and the Answer and the other pleadings must form *an issue,* and *the issue,* when once framed, is the sole point to which the testimony in the case should be directed; and the solution of the issue is the termination of the case.

In *Brent vs. The Bank,* 10 Peters, 615, the Supreme Court said:

> "Thus compelled to come into equity for a remedy to enforce a legal right, the United States *must come as other suitors,* seeking in the administration of the law of equity relief * * * This court, in *Mitchell vs. U. S.,* 9 Pet., 743, have recognized the principle in the common law, that though the law gives the King a better or more convenient remedy, he has *no better right in court than the subject* * * * "

In *The Siren,* 7 Wallace, 154, the court said that the United States as a suitor stands

> "in such proceedings, with reference to the rights of defendants or claimants, *precisely as private suitors,* except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

No matter what latitude has been given to the form of these petitions, it must be still true that the Petition *must*

state, in a definite and plain way, its cause of action; that the Answer must respond to these allegations, and the replication must seal the issue. Nothing that was said by Mr. Justice Holmes in the delivery of the opinion of the Supreme Court in the *Swift & Company* case or in the action of this court in overruling the exceptions to the Petition as filed in the present case, interferes with or is antagonistic to this position, for no case, either at law or in equity can be tried and determined without the framing of the issue.

In *Swift & Company vs. U. S.,* 196 U. S. 395, Mr. Justice Holmes said, in discussing the sufficiency of a Petition, that, while it need not have the precision of an indictment one hundred years ago.

> "It is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech."

What Should the Petition Contain?

It should substantially comply with Rule 26 of the Supreme Court of the United States, and should

> "be expressed in as brief and succinct terms as it reasonably can be."

Daniels Ch. Pl., Vol. 1, p. 314, lays down the rule thus:

> "In all cases the bill must contain as concisely as may be a narrative of the material facts, matters and circumstances on which the plaintiff relies."

On star page 605, the same author states as to a petition, that it

> "must state the material facts upon which the application is founded."

Issue.

What is the Issue Made by the Pleadings?

Let us examine at some length the Petition and its Prayers and the Answers:

The charges in the Petition by the United States (page 9) are that seven men named as defendants have engaged in a conspiracy to restrain interstate trade in and to monopolize such trade in petroleum and its products. That in 1870 the original conspiracy was formed by John D. Rockefeller, William Rockefeller and Flagler; afterwards Archbold, Payne, Rodgers and Pratt, between 1870 and 1882, joined it.

These seven men are the individual defendants named in the Petition. The Petition alleged that the original conspiracy in 1870 extended over the entire time from 1870 to the present date and still exists. That it has been (p. 10),

> "a continuing conspiracy organized and controlled by the individual defendants herein and has assumed various forms and devices and has covered various periods."

It is one identical, continuous conspiracy which the individual defendants originated in 1870, and have ever since continued. Whatever form it took, it was one the seven individual defendants used as a means to carry it on. Now it was a partnership, now a limited partnership, now a corporation; but the Petition with reiteration avers it was the seven defendants as individuals always in control. They may have used other men to help them, or all kinds of companies, but always it was the seven individuals who used them and were in control.

Referring to different pages of the Petition, we find the following averments:

(p. 9-10):

"That the defendants, John D. Rockefeller, William Rockefeller and Henry M. Flagler, in or about the year 1870, and at all times since said time, together with the other individual defendants herein, who thereafter from time to time, between said time and 1882, joined said conspiracy, to-wit, Henry H. Rodgers, John D. Archbold, Oliver H. Payne and Charles M. Pratt entered into and have ever since been engaged in a conspiracy with each other, and with other persons, corporations, copartnerships and limited partnerships, as hereinafter more particularly stated, to restrain the trade and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in the other products of petroleum, among the several States and Territories of the United States, the District of Columbia and with foreign nations, and to monopolize the said commerce.

That said conspiracy extended over the entire time since about the year 1870 until the present time, and still exists, and that the same finally in or about 1899 culminated in the corporate form of said conspiracy, hereinafter more particularly described, which has continued during each and every year until the present time between said individual defendants, the defendant Standard Oil Company of New Jersey, and the various other corporations, defendants herein, and that throughout said period from about 1870 to the present time, said conspiracy has been maintained for the purpose and with the effect of restraining the commerce in said products among the several States and Territories of the United States and the District of Columbia and with foreign nations; and for the purpose and with the effect

of monopolizing the commerce in said products in and among the several States and Territories of the United States and the District of Columbia and with foreign nations, as hereinafter more particularly alleged; that said conspiracy has been a continuing conspiracy, organized and controlled by the individual defendants herein, and has assumed various forms and devices, and has covered various periods, among the principal of which are the following:

The period from 1870 to 1882; the period from 1882 to 1899, and the period from 1899 to the present time."

(p. 10):

"That said conspiracy has been a continuing conspiracy organized and controlled by the individual defendants herein and has assumed various forms and devices."

The said *individual* defendants in connection with the Standard Oil Company of Ohio purchased

"certain interests"

in various organizations carrying on the petroleum industry for the purpose of fixing the price of crude oil and limiting its production.

(p. 11):

"The said *individual* defendants operated through the Standard Oil Company of New Jersey as a holding corporation."

(p. 12):

The seven *defendants* organized the Standard Oil Company of Ohio and used it.

(p. 14):

"The said *individual* defendants by and through the purchase of such refineries, pipe lines and other

> facilities for conducting such business in the name of the Standard Oil Company of Ohio, etc. * * * controlled the management of ninety-five per cent. of the business * * * and thereby were enabled to and did limit the production"

and fixed prices and eliminated competition.

(p. 17):

That in 1870 John D. Rockefeller, W. R. Rockefeller and Flagler and two others organized the Standard Oil Company of Ohio.

Then come the names of a lot of people who were engaged in the business, and then at the bottom of page 17 the petition says that the said associations and agreements in restraint of said trade and to monopolize said trade and commerce were organized, the management carried out and controlled by the seven individual defendants herein.

J. D. Rockefeller was president and Pratt was secretary, and through these combinations monopoly was obtained, etc. (p. 19):

That in furtherance of the combination in 1882 the said individual defendants herein caused certain minority stock interests in the Standard Oil Company of Ohio to be sold, etc., to suppress competition, etc. And during the latter part of the period prior to 1882,

> "the said *defendants* through their acquired interests as aforesaid and through their agreement with the others engaged in such business, controlled the price of crude and refined petroleum and *more than ninety per cent.* of the business, etc."

(p. 20):

> "That during said time the said *individual* defendants through the Standard Oil Company of Ohio

or some other company engaged with them in said conspiracy and acquired, etc."

other refineries which they dismantled, etc.

Again on p. 20:

"That the said Standard Oil Company of Ohio (which the seven controlled) were enabled to and did crush out and eliminate competition"

by rebates.

(p. 21):

"That the said *individual* defendants at various times entered into conspiracies with the various railroads and obtained preferential rates."

(p. 25):

"The said *individual* defendants and the Standard Oil Company of Ohio and the individuals and corporations therewith"

obtained rebates, thereby enabling

"the said defendants and the Standard Oil Company of Ohio to obtain control of and monopolize the larger part of said business."

Then comes the allegation that (p. 26):

"The Standard Oil Company of Ohio obtained control of the New York harbor and other terminals."

Then it gives the contracts with the different companies and the Standard Oil Company, etc.

(p. 29):

That the Standard Oil Company owned substantially all the refineries at Cleveland and that they had a contract by which they got certain rebates and advantages; and so it is alleged on p. 30, and so with reference to the Empire Transportation Company, and so on p. 31, and so on p. 32 it speaks

of the Standard Oil Company. And so on p. 33 it speaks of the payment of rebates to Standard Oil Company. It says that the American Transfer Company was owned and controlled by the Standard Oil Company, and then it speaks of that contract.

On p. 35 that during this time the Standard Oil Company got fifteen cents a barrel extra, making in all a rebate to it of fifty-one and one-half cents.

That the Standard on refined oil got a rate of $.80, whereas the others paid $1.44 (p. 36).

It then refers to the agreements of 1880, and on p. 38 it says that the Standard and the other parties of the first part, including several of the *individual* defendants herein, agreed to abrogate the system of rebates.

On p. 38 it says:

> "Your petitioners allege that the *individual* defendants herein, some or all of them, own an interest in each of said corporations and limited partnerships named in the said agreement as parties of the first part, and each one of said corporations and limited partnerships was engaged with the said defendants and Standard Oil Company in said conspiracy to restrain and monopolize commerce."

Again on p. 38 it is alleged that the said *individual* defendants and others allied with them, obtained the ownership and control of all the pipe lines, and that thereby (p. 39) the said individual defendants and the Standard Oil Company were enabled to fix the price of crude oil.

Again, on p. 39, it is alleged that the *individual* defendants herein, through their ownership of stock or their inter-

ests in various corporations and through the unlawful associations, etc., and for the purpose of eliminating competition, on or about the second day of January, 1882, wilfully, wrongfully and unlawfully entered into a trust and agreement.

Up to 1882 all the averments as to the Standard Oil Co. refer solely to the Ohio corporation.

Then comes the Trust Agreement, with all its provisions, and then it is alleged (p. 54) that these persons signing the trust agreement owned and controlled ninety per cent. of the oil business.

On page 55, that the trustees organized the Standard Oil Company of New Jersey, with John D. Rockefeller as president.

(On page 58):

> "that the *individual* defendants herein constituted the majority of said trustees, and *controlled,* managed and directed the said trust and all the subsidiary corporations and businesses so combined by the said Trust Agreement."

Trustees acquired other business, etc., etc., and controlled, etc., etc.

(On p. 63):

> "The *individual* defendants herein being at all times a majority of and in control of said Board of Trustees."

Then comes the litigation in Ohio and the appointment of trustees, etc.

(p. 66):

"The said *individual* defendants continued their control and joint ownership, and the conspiracy to control the business of the said several corporations."

Again on p. 69:

"The *individual* defendants in this action who were liquidating trustees did continue to manage the affairs of all said separate corporations so engaged in said business, in the same manner as they had theretofore under and by virtue of the terms of said trust agreement."

Again, on p. 69:

"That during the said period the *individual* defendants herein acting as such trustees for the purpose of eliminating competition, etc., acquired, etc., stocks in other companies."

Again, on p. 70, that about the month of January, 1899:

"The *individual* defendants herein having conspired and confederated together as aforesaid, under various arrangements, as herein alleged, and said trust agreement, for the purpose of restraining trade and commerce * * * did in continuation thereof and for the purpose of making said combination, conspiracy and monopoly more complete and effective, conspire and confederate together, with divers other persons and corporations further to restrain the commerce and trade in petroleum."

And again, on p. 71:

"And for the purpose of carrying out said conspiracy and effecting said monopoly caused the stock ownership, etc.,"

that is, the individual defendants before named.

Again, on page 71, that the said individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended; and the purpose of it was to do the business with the different corporations.

> "as had been done by the individual defendants through said trust agreements in suppression, etc."

Again, on page 73, that from the time of the organization of the New Jersey company to the present time

> "the said *individual* defendants have been members of its board of Directors and its officers, and *have owned a majority of its stock,* and have dominated and *controlled said combination* for the purpose and with the effect of restraining and monopolizing said trade and commerce as aforesaid."

On page 73, that the said *individual* defendants caused all the stock of the said subsidiary corporations, etc., to be divided, etc., and exchanged for certificates in the New Jersey Standard Oil Company.

Again on page 74:

> "The said *individual* defendants in furtherance of said conspiracy purchased or acquired in the name of the Standard Oil Company of New Jersey, etc., all the stock, etc."

Again, at the bottom of page 77, that during all the time since 1899 the said individual defendants have been the principal directors and officers of the New Jersey Standard Oil Company and have controlled said New Jersey Standard Oil Company which is a holding company (p. 78).

> "reorganized and continued by said parties for the purpose of taking the place of the said trustees, etc."

Again on page 79:

"That the said *individual* defendants, through the Standard Oil Trust and Standard Oil Company and their various subsidiary corporations have therefore during each and all of the years since the organization of said Standard Oil Trust in 1882, and the said Standard Oil Company in 1899, been engaged in and are now engaged in interstate commerce."

(pp. 84-85) "That the said Standard Oil Trust during all of its existence from 1882 to 1899, and since 1899 the Standard Oil Company, and their various subsidiary corporations and the said individual defendants acting through both said Trust and corporations, have been engaged continuously in producing crude oil, etc."

Again on page 85:

"And the said *individual* defendants through said Trust and said various corporations have during said time thus shipped, refined and sold *more than ninety per cent.* of the petroleum products manufactured and consumed in said states and territories of the United States and the District of Columbia, and shipped therefrom to foreign countries, and have monopolized commerce, etc.

Again at the foot of page 85:

"And that they have thus restrained the said commerce among the said states and territories and foreign countries as aforesaid, and have regulated the production and supply of such products, and fixed the price thereof in such states and territories and the District of Columbia."

(86)

"The said parties have so monopolized and restrained the said commerce by the means and various combi-

nations as hereinbefore specifically alleged, and by the additional means, among others, as follows, to wit."

Again on page 87:

"That the *individual* defendants herein, the Standard Oil Company of Ohio, and its allied companies, undertook to obtain control of the Tidewater Company."

(p. 101):

"Your petitioner alleges that the *individual* defendants through said Standard Oil Trust and the Standard Oil Company, after 1899, have at various times entered into contracts with competing refineries, etc."

(p. 102):

"And by these means they have restrained competition of such refineries and producers and have monopolized commerce in petroleum and its products."

(p. 107):

"The defendants through the Pacific Coast Oil Company have during the three years last past had contracts, etc."

(p. 108):

"That one of the means by which said *individual* defendants through the Standard Oil Trust and the Standard Oil Company and the subsidiary corporations controlled, etc."

(p. 109):

"That during all of said time the said *individual* defendants, the Standard Oil Trust and the Standard Oil Company, and their subsidiary corporations, have by and through said conspiracies, etc."

(p. 162):

"Your petitioner further alleges that at the instance of the said *individual* defendants the said Standard Oil Company and its affiliated and subsidiary corporations, etc."

(p. 164):

"The *individual* defendants and other individuals associated with them in the Standard Oil Trust and interested with them in the Standard Oil Company and its subsidiary corporations have purchased and acquired large interests, etc., in railroads."

(p. 182):

"Your petitioners allege that by reason of the various means herein set forth in detail, among others, the said *individual* defendants, by and through the said unlawful oil trust and the Standard Oil Company, after 1899, have monopolized, etc."

(p. 187) Under the head of *Jurisdiction*:

"Your petitioners further allege that said *individual* defendants through and by means of the said corporation defendants are carrying on the business of shipping petroleum, etc."

Prayers.

The prayers of the bill are:

(1) For a decree that the combination and conspiracy described is unlawful and that all acts done or to be done to carry it out are in derogation of the common rights of all the people of the United States and of the Sherman Act.

And that the defendants, their officers, etc.

"be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same."

(2) For a decree that the said *individual* defendants and each of them, in violation of the provisions of sections of the Sherman Act, entered into a conspiracy with one another to restrain trade and commerce in the purchase of petroleum, in the shipment of the same by pipe lines, railroad or steamship;

"In the manufacture and refining of the same, and in the distribution, sale and shipment of the products thereof among the several States and Territories," etc.;

and that in pursuance of that conspiracy, the said *defendants caused* the Standard Oil Company of New Jersey to be formed and property transferred to them.

And your petitioners pray that such *holding,* ownership and *control over* said various defendant corporations by the said individual defendants and by the Standard Oil Company of New Jersey be decreed in violation of said Sherman Act, unlawful and void.

And the said defendants and the Standard Oil Company of New Jersey,

"be enjoined, restrained and prohibited from exercising any control over said corporations or any of them,"

by election or appointment of directors, etc.,

"or in any other manner,"

and that the corporations be prohibited from declaring or paying any dividend to the Standard Oil Company of New Jersey, or to any person for said Standard Oil Company.

(3) That each of the Acts in pursuance of the conspiracy be decreed to be in violation of said Act of Congress, and

injunction be issued commanding defendants to desist from the unlawful acts.

> (4) That each of the defendants be enjoined from "Entering into, taking part in or performing any contract * * * the purpose or effect of which will be"—

as to petroleum—to restrain trade—monopolize trade—by placing control of corporations,

> "or agreeing or contracting together or with one another, expressly or impliedly, directly or indirectly, with respect to the control of said corporations, or in respect to the purchase, shipment, transportation, manufacture, sale or distribution of petroleum or the products thereof, or by contracting and agreeing together or with one another, expressly or impliedly, directly or indirectly, as to the price at which said products shall be purchased or sold, as to the persons or corporations to whom it shall be sold, or as to the territory in which any of such products shall be sold or otherwise disposed of or as to the amount or quantity which shall be sold, purchased, shipped, manufactured or disposed of, or by agreeing or contracting together with one another with a view to the imposition of any burden or condition upon the production, transportation, manufacture, sale or disposition of such products."

> (5) *General Relief.*

Answers.

Many answers have been filed, but they all agree in this.

Each unequivocally and broadly denies these averments of the petition: They deny all charges that there ever was, by the defendants or any of them, a conspiracy in restraint of interstate trade and commerce in crude oil, or that any

of the defendants had monopolized or attempted to monopolize interstate trade in crude oil and its products.

Charges and Prayers of Petition Defective.

The petition on page 9, where it charges the crime states that the conspiracy was "to restrain" the interstate trade in oil and "to monopolize the said commerce." This does not charge the crime created by section one. The Act points the difference between a conspiracy or combination which agrees to, and then which *actually* does, restrain trade; *i. e.,* "in restraint of trade." The attempt to restrain trade is not an offense under section one as it is under section two, to attempt to monopolize. To read the two sections is to demonstrate that. The charge then in the petition is only *good* as the charge of an attempt to monopolize under section two.

Now the prayer that the individual acts done

> "are in derogation of the common rights of all the people of the United States,"

seems to ask an indefinite thing this court is powerless to grant, and the prayer that the court decree things not identified to be

> "in violation of the Act of Congress of July 2nd, 1890, entitled," etc.,

without stating how or in what respect is not the sharp definite thing which the Act authorizes.

Swift & Co. vs. United States, 196 U. S., 575, 401.

Then petitioner prays for a decree that the individual defendants entered into

> "an agreement, combination and conspiracy with *one another* to restrain trade * * * and monopolize said trade—,"

(1) In the purchase of petroleum;

(2) In the shipment and transportation of the same by pipe lines, by steamship and by rail;

(3) In the manufacture and refining of the same;

(4) And in the distribution, sale and shipment thereof among the several States.

Then follows a prayer which seems to be merely for a decree

"that such holding, ownership and control,"

of the properties of all the defendants by the seven individual defendants is of itself a violation of the Sherman Act.

What is the Issue.

What, then, is the charge made by the petition in this case, and what is the issue that is framed? We have analyzed the petition and read its charges and the defendants' answer and we have seen that the issue is the charge made in the petition, denied in the answer, and re-asserted in the replication, and it is that the seven individuals (repeatedly called throughout the petitioner the "individual defendants," being John D. Rockefeller, William R. Rockefeller, John D. Archbold, Oliver Payne, Henry M. Flagler, Charles Pratt and Henry H. Rogers, combined and conspired and continued to combine and conspire at the time when this petition was filed to restrain interstate trade in oil and to gain a monopoly of the same. It is reiterated on half the pages of the petition. The conspirators are always identified as the "seven individual defendants," and it is averred that these individual defendants worked through various corporation and partnerships and limited partnerships, and the petition always al-

leges that these individual defendants controlled all these partnerships and limited partnerships and corporations, and used them as their tools to effectuate the conspiracy. The answer denies these averments.

It is, of course, true that if there was such a continuing conspiracy as charged in the petition, each one of the corporations used by the seven individual defendants became a party to the conspiracy by aiding or abetting, and so this court held (*U. S. vs. S. O. Company,* 152 Fed. Rep., 294); but this court also said that

> "The alleged conspiracy is one. Its scheme is single. It has but one object."

Undoubtedly, then, this one alleged conspiracy is that charged in the petition or page 9 as follows:

> "That the defendants, John D. Rockefeller, William Rockefeller and H. M. Flagler, in or about the year 1870, and at all times since said time, together with the other individual defendants herein, who thereafter, from time to time, between said time and 1882, joined said conspiracy, to-wit: H. H. Rogers, John D. Archbold, Oliver H. Payne and Charles M. Pratt, *entered into and have ever since,* been engaged in a conspiracy with each other and with other persons, corporations, co-partnerships and limited partnerships, as hereinafter more particularly stated, to restrain the trade and commerce in petroleum, commonly called crude oil, in refined oil and in the other products of petroleum among the several States and Territories of the United States and the District of Columbia, and with foreign nations, and to monopolize the said commerce."

A *conspiracy not originated by and continued* and controlled by these seven individual defendants is not the one charged in the petition. The answer denies such a conspiracy.

Stated in the form of a question, the issue is:

Does the proof show that these seven individual defendants, the two Rockefellers, Archbold, Payne, Flagler, Pratt and Rogers, at the time when this petition was filed, controlled the Standard Oil Company of New Jersey which has been termed the "Holding Company," and through the Standard Oil Company of New Jersey, *controlled* all the other corporations, partnerships and limited partnerships named in the petition, and by means of them restrained interstate trade, and created a monopoly in oil?

The question primarily involves:

(1) Do the seven individual defendants *control* these partnerships and corporations?

(2) Do these seven thus controlling, use these partnerships and corporations to restrain interstate trade in and a monopoly of such trade in oil?

It seems to me that here the Government's case has wholly failed. It was optional with the Government to make such charges as it thought were true, and to charge such of the defendants as conspirators as it saw fit. The Government saw fit to define the charge in the manner in which it did, and to hold up these seven individual defendants as the conspirators who combined to restrain and monopolize interstate trade in oil through and by various corporations and partnerships, and it should be content with the decision of the case on that issue. On that issue the Government's case wholly fails, for the evidence conclusively proves that the seven defendants did not, when the petition was filed, control either the defendant corporations or the New Jersey Standard Oil Company or the Trust of 1882

Evidence in the case as to the interests of the seven individual defendants and their control of the Standard Oil Company of New Jersey.

The evidence in the case shows that the seven individuals do not own at the present time, and did not own at the time when the bill was filed in this case, a majority of the stock of the Standard Oil Company of New Jersey, or anything like a majority.

The defendant's Exhibit No. 1 (Vol. 18, p. 1), gives a list of all the stockholders of the Standard Oil Company of New Jersey on August 19th, 1907. From this we find that there have been issued 983,383 shares of stock, and that the seven individual defendants own the following number of shares each:

John D. Archbold (p. 3)	6,000	shares;
H. M. Flagler (p. 29)	30,500	"
O. H. Payne (p. 63)	40,000	"
Charles M. Pratt (p. 66)	5,000	"
H. H. Rogers (p. 71)	16,020	"
John D. Rockefeller (p. 71)	247,692	"
William R. Rockefeller (p. 71)	11,700	"
Total	356,912	

This gives to the seven individual defendants between 36% and 37% of the total shares issued by the Standard Oil Company of New Jersey.

It is also shown by the evidence that the seven individual defendants constituted a minority on the Board of Directors of the Standard Oil Company of New Jersey.

Petitioner's Exhibit No. 8, offered in evidence by the Government itself (see Vol. 7, page 53), gives the Directors and officers of the Standard Oil Company of New Jersey and of the sub-companies for the year 1907. This exhibit shows the following directors of the Standard Oil Company of New Jersey (see Vol. 7, page 78).

John D. Rockefeller,	Charles M. Pratt,
William Rockefeller,	E. T. Bedford,
H. M. Flagler,	Walter Jennings,
John D. Archbold,	James A. Moffett,
H. H. Rogers,	C. W. Harkness,
Wesley H. Tilford,	Col. Oliver H. Payne,
Frank Q. Barstow,	John D. Rockefeller, Jr.

A. C. Bedford.

The above list comprises fifteen directors in all, of which the seven individuals constitute a minority, the board standing seven to eight against them.

CONCLUSION.

On its own showing the Government has failed to sustain the affirmative of the issue, and its case therefore fails.

SECOND.

THE MERE OWNERSHIP BY THE DEFENDANTS OF THE REFINERIES, PIPE LINES, PRODUCING OIL WELLS AND OTHER PROPERTIES SHOWN BY THE EVIDENCE, AND THE TRANSPORTATION AND SALE BY THE DEFENDANTS OF CRUDE OIL AND ITS PRODUCTS IN INTERSTATE TRADE IN CONNECTION WITH SAID PROPERTIES, DOES NOT OF ITSELF CONSTITUTE A MONOPOLY OR RESTRAINT OF TRADE UNDER THE SHERMAN ACT EVEN IF THE DEFENDANTS GAINED A CONTROL OF A LARGE PART OF SAID INTERSTATE TRADE, AND ESPECIALLY NOT IF, AS SHOWN IN THIS CASE, SUCH OWNERSHIP AND CONTROL WAS THE NATURAL EVOLUTION, DEVELOPMENT AND GROWTH OF WHAT WAS ORIGINALLY A SMALL INVESTMENT IN THE OIL INDUSTRY.

To prove a violation of Section 1 of the Sherman Act the Government must show that when the Petition was filed we were *then* by contract actually restraining interstate trade in oil.

To make a monopoly under the Sherman Act, the Government must show:

1—That the defendants were, when the Petition was filed, *then* using unlawful means to maintain their control of the industry;

2—That the defendants were then by unlawful means, excluding others from said industry.

THIRD.

THE THING WHICH, AND THE ONLY THING WHICH, THE GOVERNMENT CAN AND DOES COMPLAIN OF, IS THAT WE WERE, WHEN THE PETITION WAS FILED, THEN RESTRAINING AND MONOPOLIZING INTERSTATE AND FOREIGN TRADE IN OIL. WHATEVER TRADE THERE THEN WAS IT WAS DISTINCT AND INDEPENDENT FROM WHATEVER TRADE THERE HAD BEEN IN 1890. THE GOVERNMENT DOES NOT AND CANNOT COMPLAIN OF OUR MONOPOLIZING (WHICH WE DENY) THE STATE INDUSTRY OF PRODUCING AND REFINING OIL; BUT ONLY THAT WHEN THE PETITION WAS FILED, WE WERE ACTUALLY RESTRAINING AND MONOPOLIZING THE THEN INTERSTATE AND FOREIGN TRADE IN OIL.

This case is not a question of defendants monopolizing a necessity of life, but only of interstate trade in oil, and only as to this interstate trade does the Sherman Act extend. The United States is not concerned, nor has it jurisdiction over such monopolies as raise the prices of the necessaries of life.

The *Lottery Cases,* Fuller, C. J., 188 U. S. 365.

When we eliminate from the case the production and refining of oil, we see clearly that the Government must show an *active present actual* restraint and monopoly of interstate and foreign trade on November 15th, 1906, in oil, and that it does not so prove that fact merely by showing that the defendants did restrain and monopolize the interstate and foreign trade in oil in 1890. The two periods are distinct and independent; and proof of a violation of the Sherman Act in one period is not proof of the violation of the Sherman Act in the other period. By merely showing that the defendants still own the same refineries, producing oil wells and pipe lines that they did in 1890, and are still engaged in interstate and foreign trade, the Government does not show a

breach of the Sherman Act in 1906. A *fortiori majore,* even if it were admitted (which it is not) that in 1872 the defendants did restrain interstate trade in oil this would not prove a restraint in 1906, even if the same property were used.

This Brief, in support of the foregoing propositions, discusses and maintains the following:

1st. That the Government's case depends solely and only on the Sherman Act, which Act is wholly prospective and not at all retrospective; That the Petition asking for equitable relief must of necessity assert, and the Government must maintain, that when the Petition was filed in November, 1906, (and not at some prior time), the defendants were *then* actually engaged in restraining and monopolizing interstate and foreign trade in oil, contrary to the provisions of that Act. In such proceedings as this, the sole and only relief the Government can ask is to prevent, restrain and prohibit the continuation of the particular things which are violations of the Sherman Act. This does not authorize a decree giving affirmative relief.

2nd. This case involves and only involves the question of the restraint and monopolization of inter-state and foreign trade in oil in November, 1906, when the Petition was filed; it does not involve any alleged restraint or monopoly of the oil industry in any of the States, and even if it had been proven (which it has not), that the defendants monopolized the production and refining of oil in each of the States in which it carried on business, or that it monopolized the sale of oil in each of those States, (which is immaterial and irrelevant), these would in no way aid the Government in the maintenance of the present suit, which involves only the question of the violation of the Federal Statute, which statute is passed to protect solely interstate and foreign trade.

3d. Each of the alleged conspirators in this case, as citizens of the United States, had the right granted him by the Federal Constitution to adopt such calling or trade as to him was most conducive to the exercise of his liberty, and having adopted such trade or industry, it became his property just as much as if he had invested his money in a parcel of real estate. Each had the right to follow such trade, associate himself with others, and adopt such means as the formation of partnerships and corporations which the law allowed in so following; and to use all his ingenuity, skill and property to make his business a success. His liberty gave him the right in such trade to enter and compete for the interstate and foreign traffic, and no Federal law limits or attempts to restrict the extent to which he may compete for that interstate and foreign traffic, or denies his right to associate others with him in partnerships or in corporations or so-called trusts, in such competition.

4th. The Federal law allowed and allows each of the individuals to freely compete for the interstate and foreign traffic in oil and its products. He may use all the weapons his ingenuity and skill can suggest to wage a successful warfare. His rights to compete are not limited to merely such as are *fair or reasonable,* but are only limited by such as are *unlawful* and directly tend to the violation of the Sherman Act. No Federal law has or does restrict such competition by saying it must not be *"unfair"* or *"undue"* or *"unreasonable,"* but gives the widest liberty in such strife and limits the means only by forbidding the use of that which is unlawful and tends to create the restraint of trade or the monopoly forbidden by the Act.

The Federal law also allows and assures to each competitor whatever share of the interstate or foreign trade in oil he or they may win—no limit is put to what he or they

may win. Provided his means are not unlawful, he may win all he can of such trade, even gain a temporary monopoly and temporarily fix prices. Such monopoly is comparatively harmless if the future trade is left open to competition.

5th: The Sherman Act was passed to protect trade and further competition. The Act does not forbid, but recognizes as lawful, combinations, corporations, and even trusts engaged in interstate and foreign trade, and only prohibits them from making contracts directly, substantially and immediately restraining such trade or attempting by unlawful means to monopolize the same.

It makes such restraint and monopoly a crime and inflicts, on conviction, severe penalties for such offense.

It does not limit the quantity of such trade any one or more may gain. It does not forbid the legitimate growth of lawful business, however great that growth may be, nor does it forbid the wealthiest of corporations and men to engage in such trade.

It permits one set of competitors to purchase the property of other competitors solely to avoid further competition. The mere size of the competing corporation or combination is immaterial.

In addition to the indictment and punishment, and distinct from it, the act allows the courts on petition of the government to restrain, prohibit and prevent the continuance of acts forbidden by said act, and which it makes crimes.

To sustain the present petition, the Government must clearly prove:

(1). The commission by defendants of a crime;

(2). That such crime was actually being committed when the petition was filed in November, 1906.

6th: The alleged monopoly that is complained of in this case is not in the ownership of the oil or refineries or pipe lines themselves, but merely in the intangible, shifting uncertain thing called interstate and foreign trade in oil.

The monopoly of a trade at common law was forbidden because, and only because, it excluded all others from practising such trade, and seems to have been then limited to a Royal Grant, as for example giving the exclusive right to manufacture playing cards. It was, and is a distinct thing from engrossing, regrating or forestalling the market, all of which were based on the prevention of artificial prices for the necessaries of life. No one of these falls under Federal jurisdiction but each is subject to state control only. To prove a monopoly as is here alleged, the Government must show that the monopoly (using the word in its popular sense) was created by unlawful means and that the defendants, *when the petition was filed,* were using *unlawful* means to exclude others from the trade.

7th. The present litigation is between the Federal Government and certain of its citizens. The questions involved are solely the rights of these Federal citizens and the effect upon those rights of the Sherman Act, and whether these Federal citizens have violated the provisions of that Act.

The violation of that Act, the Act itself makes a crime, and the Government must prove the commission of such crime by acts unlawful under Federal laws.

There was, and is no such thing as a Federal crime, aside from express Congressional acts, and as no such act

was in existence prior to 1890, as to the matters charged in the petition, all the matters and things done by the defendants prior thereto are immaterial.

8th. The character of the oil business was and is such that a great corporation was and is an economic necessity for carrying on that industry; the facts in this case and the history of the development of the oil industry prove that what is commonly called the Standard Oil Company was the necessary means by which the industry was fostered and advanced, and without which it would have languished and been much less successful. The Standard Oil Company was the result of the natural laws of trade working on such industry, and the position gained by it was the natural result of the lawful use of competition directed to a unique and unparalleled business where the risks and the uncertainty of the business necessitated more than usual profits in the handling of the same.

The Government has wholly failed to prove that in 1870 Rockefeller and others combined to restrain interstate trade in it and gain a monopoly of the same.

9th. The Government case depends upon its maintaining *inter alia*:

(*a*). That the Trust Agreement of 1882 was contrary to some known recognized Federal *common* Law forbidding such contracts as restraints of interstate and foreign trade.

(*b*). That practically the Trust Agreement was in force until 1899 when the New Jersey Corporation took its place.

(*c*). That the conveyance to the New Jersey Corporation was a continuance of the Trust Agreement and in addition itself an additional restraint of trade which tended to monopoly.

The answers *inter alia* to these propositions are:

(1). That there was no Federal Common Law in 1882 forbidding the contract or Trust Agreement then made, and that such Trust Agreement was *not* void, but was expressly recognized at Common Law.

(2). It was a mere method which certain individuals lawfully owning jointly certain properties which they in common lawfully used for a single purpose, adopted, for the more convenient care, control and management of such properties so jointly owned. It had no provisions restricting trade and had no relation whatever to the *vice* in the Northern Securities Case which was the attempt, under a state charter, to unite competing railroads and stifle competition, contrary to the provisions of the Sherman Act. The properties the New Jersey Standard Oil Co. took were *non-competing,* were not of themselves engaged in interstate trade, or in any public use, and were lawfully used as one whole by the individuals owning them and were continued to be so used by and through the New Jersey Corporation.

10th. The present case is not ruled by and the above propositions are not contrary to that of any decided case. We give a careful analysis of all the decided cases in support of above.

DETAILED DISCUSSIONS OF FOREGOING PROPOSITIONS.

That I may intelligently present the questions I think this record raises for discussion, let me first state certain things which both sides must agree to, or at least which are plain, and thus clear the ground for the consideration solely of the real questions in controversy.

This case is one where individual citizens, being the joint owners of private noncompetitive properties,

are using the same in private trade. They are not in a public or *quasi* public business. Their business is confined to one thing only; *i. e.,* crude petroleum and its products. They are producers, manufacturers and traders in it. As such, their rights and privileges are far different from that of competing railroads or gas companies or business or occupations impressed with a public duty. They may deal with whom they choose and refuse to deal with others. They may compete for the whole interstate trade in oil and lawfully win. The extent of their properties, the extent of their business, the eager energetic methods with which it is carried on are not forbidden, but are encouraged by the law. The partnerships, limited partnerships and corporations through which they work are all private traders, and if the Petition in this case is to be believed, managed and controlled by the seven individual defendants.

Their pipe line system is an indispensable and absolutely necessary adjunct to their refineries, to transport to them the oil. They do carry principally from the wells to their reservoirs or tanks oil for others; but this is a distinct and comparatively small part of their business, and does not characterize or stamp or necessarily connect itself with their other and main business of refining crude petroleum and selling the refined oil and its by-products.

The consideration of the case should begin with a recognition of these facts, and the acknowledgement of the truth that such cases as the Trans-Missouri, the Freight Assocation and the Northern Securities Company are entirely different, governed by different rules; and to consider them is merely to mislead one in a case of this nature.

I therefore state—Defendants are private citizens engaged in a private enterprise—same rights as the partner-

ship that runs a department store—were not in 1879 or 1882 or 1899 competitors.

(1st). That this case only involves interstate and foreign commerce; and limiting even the word "commerce" I further state that this case only involves interstate trade, and still further limiting it, *in* oil and its products. I include in the word "trade"—

(*a*). The article traded in while, but *only while,* it is in actual transit from one state to another;

(*b*). The bargaining for the same or exchange of the article;

(*c*). The transportation from one state to another of the article.

All three of these made up the interstate and foreign trade. Such trade has no relation whatever to the *ownership* of the article traded in, but solely and only to its presence as the thing transported and bargained about. When you speak of interstate trade, you mean not the article dealt in except as the object of trade, but the bargaining for the selling of and the transportation of that article between the states.

The oil before it goes into interstate trade is not under Congressional control.

The Federal Government does not concern itself with how one acquired the article put into interstate trade.

When the article traded in has been joined with the general mass of state property it has passed out of interstate trade, and no matter what may be the means used to gain the trade in that oil, this does not violate the Sherman Act or bring it under Federal control.

Anything then done *before* the oil got into interstate commerce, or *after* it got out of interstate commerce, cannot be a violation of the Sherman Act.

(2nd). This case in nowise involves any question under the statutory laws of any of the States, or of the common law of any of the States in reference to what constitutes a restraint of trade or a monopoly of trade, or any policy of Ohio or Illinois. No matter what violations there may or may not have been of State laws or of the common law of any one of the States as to restraint of trade or monopoly, such are now and here wholly important.

As the Supreme Court said in the Knight & Co. case, 156 U. S. 10, the

> "monopoly and restraint denounced by the Act are the monopoly of interstate and international trade or commerce,"

and not of

> "a monopoly in the manufacture of a necessity of life."

This case does not involve how or when or by what means the defendants acquired their title to all their properies; or whether in any respect they violated any of the State laws in so doing; whether, for example, in any State they gained a monopoly of the refining business or the pipe line business. All these things are matters between the several States and the defendants, and not between the United States and the defendants.

> "The power of the State to impose restraints and burdens on persons and property in conservation, and promotion of the public health, good order and prosperity, is a power originally and always belonging to the

States; not surrendered by them to the general Government."

Fuller, C. J., *Lottery Case,* 184 U. S. 364;
Douglass vs. Ky., 168 U. S., 488.
U. S. vs. E. C. Knight & Co., 156 U. S. 16.

The case solely and only involves *the use* of products of that property in the interstate trade, and while it is in transportation. Until it enters into the interstate trade and is in actual transportation, its acquisition and ownership are matters not within Federal jurisdiction.

Northern Securities Case, 193 U. S.

The extent to which Congress may control the use is not here for discussion for it is only sought to control—*not* the thing itself—(except where it authorizes its forfeiture) but contracts, combinations, conspiracies and monopolies which interfere with and restrain free open trade between the States. In this suit, it mentions crude oil and its products. It alleges violations only of the Sherman Act.

The sole question then is:

Are the defendants violating the Sherman Act; and the sole statute we have to study and construe is the Sherman Act. Unless the Government has proven that when the petition was filed the defendants were *then* actually violating the Sherman Act, its case fails.

Let me assume (what is not a fact) that the defendants have gained a monopoly of the manufacture of refined oil and practically control the refining of oil in all the different States. Admittedly, that is not a matter of which this court has jurisdiction, or, indeed, can have. The alleged viola-

tion of State laws or the formation of State monopolies or the creation of restraints of trade inside the States is foreign to the discussion.

This case does *not* involve any title or property right of the defendants. All such titles and property rights are conferred and governed by the laws of the several States, and over those cases and over such property or property rights this court has no jurisdiction whatever.

Fuller, C. J., said in the *Knight Case,* 156 U. S. 16, that Congress did not attempt by the Sherman Act to

> "*assert* the *power* to deal with *monopoly* directly as such, or to limit and restrict the rights of corporations created by the States or the citizens of the State in the acquisition, control or disposition of property *....* * *or to make criminal* the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."

In the *Northern Securities Case* Judge Harlan said, the purchase of stock in a State corporation—the acquisition and sale of property—were under State control; and he added that the Federal Courts or Federal laws could not compel the dissolution of a State corporation.

Northern Securities Case, 193 U. S., 197.
Kidd v. Pearson, 128 U. S., 1.

This does not deny that to determine whether the defendants have violated the Sherman Act you may take into consideration all the facts and circumstances in the case, but it does deny that because the defendants may or may not have used in different instances improper methods to gain State trade, that you can infer from such State violations that the defendants violated the laws for interstate trade.

(3rd). These defendants have not been indicted and are not being tried on the criminal side of the court for something HERETOFORE done in violation of the Sherman Act. The Sherman Act does provide penalties for such violation, makes the crime a misdemeanor, and declares that, on conviction thereof, certain punishments shall be inflicted. That portion of the Act is the criminal portion and clearly indicates a trial in the methods assured to the individual by the Constitution of the United States. Such a trial under Article III must be by jury; the proof would have to be beyond a reasonable doubt; the charge would be a prior well-defined act; and the results would have far other and different consequences than under the present case.

In one sense, indeed, the two distinct, independent provisions of the Act, *i. e.,* punishment for a crime already committed and prevention of further commission of a continuing crime—have close connection with each other, for to find an indictment on the criminal side as well as to file a petition on the civil side, requires proof of the identical crime. The difference is that on the criminal side you refer solely to the past while on the civil side you refer solely to the present.

The Sherman Act is a criminal statute.

United States v. Freight Association, 58 Fed. 58, 77, Sanborn, J.:

> *"The Anti-Trust Act is a criminal statute."*

Northern Securities Co. v. United States, 193 U. S. 197, 401. Holmes, J.:

> "The *statute* of which we have to find the meaning *is a criminal statute.* The two sections on which the

Government relies both *make certain acts crimes.* That is their immediate purpose and that is what they say. It is vain to insist that this is not *a criminal proceeding.* The words cannot be read one way in a suit which is to end in fine and imprisonment, and *another way in one which seeks an injunction.*"

As the thing charged is a crime, it is by no means certain that the Government should not prove its case beyond a reasonable doubt.

In considering the degree of proof, the Supreme Court of Missouri said in *State v. Continental Tobacco Co.,* 177 Missouri, page 1:

"However, it must be remembered that this proceeding partakes of the nature of a criminal prosecution, severe penalties are imposed; hence, it is not sufficient to warrant a finding adverse to respondents, that we may entertain strong suspicions, or even strong probabilities, of their guilt. Such conclusions should only be reached upon a clear showing of the testimony, fully satisfying the minds of the Court that they were guilty of the violations of the law as charged in the information."

4th. That the case involves the Sherman Act only and is governed and must be determined solely by the Act is perfectly plain.

The petition's prayers for relief are only under that act.

Thus the first prayer is that the court decree that the acts done are

"In violation of the Act of Congress of July 2nd, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies."

The second prayer is for a decree that the individual defendants

> "in violation of the provisions of Sections 1 and 2 respectively of the said Act of Congress, approved July 2nd, 1890, entered into an agreement," etc.

The third prayer that the holdings, etc., be decreed

> "To be in violation of said Act of Congress."

So each of the other prayers is based solely on the Sherman Act.

There is no other Federal Statute authorizing the filing of such a petition, or giving the extraordinary power to a Court of Equity to restrain the commission of a crime in such cases as alleged in the petition.

The prayer that the acts done under the alleged conspiracy

> "are in derogation of the common rights of all the people of the United States"

is probably rhetorical and so intended, because no one could suppose this court had such power.

The Wilson Act merely refers to imports from foreign nations, and not to interstate or foreign export trade, and therefore has no application to this case.

In the *Addyston Pipe Case,* 78 Fed. Rep., 712, where the United States filed the petition, the Court said:

> "In a suit such as this in the name of the United States jurisdiction depends *alone* upon the Sherman Act,"

not upon any alleged Federal common law but *solely* upon the Sherman Act.

The Sherman Act has no retroactive effect but is prospective only.

The Supreme Court said in the *Trans-Missouri Case,* 166 U. S. 342, that

> "There can be no question of any act being regarded as a violation of the *statute* which occurred *before it was passed.*

In the *Deuber Watch Co. Case,* 66 Fed. Rep. 637, the Circuit Court of Appeals said that the only acts that the plaintiff could contend were forbidden by the Sherman Act

> *"are those done after its passage."*

5th. The present case not only merely involves a question of interstate trade, but it is still more restricted, for it involves only a single question, and that is *whether at the time when the petition* was filed, (Nov. 15, 1906) the defendants were then violating the Sherman Act. If they were, the case comes within the provisions of the fourth section of that act, but it is perfectly obvious that the point of time and *the only point of time* to which the attention of the Court should be *exclusively* directed is the time when the petition itself was filed; and that necessarily follows from the wording of the Act itself. The United States has seen fit to appeal to this portion of the Sherman Act whereby a Court of Equity is given the extraordinary jurisdiction to prevent and restrain violations of the Act, which violations had already, by the Act, been declared to be misdemeanors.

The fourth section of the Sherman Act gives the Federal Courts power "to prevent and restrain violations of the act." The only jurisdiction given is to stop something going on—something deing done when the petition is filed.

Primarily *"to prevent"* means to hinder something that hereafter is to take place; the word *"restrain"* bears its own plain meaning of pulling back that which is in actual motion, which is then actually being done.

So when you say that a Court may *prevent and restrain,* you necessarily consider only and restrict yourself to the present and the future. You cannot either *prevent* or *restrain* a thing that was done twenty or fifteen or ten or five or two or one year ago; you can prevent and restrain that which is now in operation and continuing, but it is simply impossible to prevent and restrain that which has been done.

Lancassagne vs. Chapnia, 144 U. S., 119, 124.

Not only do these words *prevent* and *restrain* demonstrate this, but the same Section adds that proceedings to enforce the Act may be by way of

> "petition setting forth the case and praying that such violation shall be *enjoined* or otherwise prohibited;"

and then it adds that the courts may

> "make such *temporary* restraining order or prohibition as shall be deemed just in the premises."

Twice the expression is "prevent and restrain;" then the word "enjoin;" then the phrase "restraining order" and the word "prohibited" and "prohibition." Each one of these can only mean to give jurisdiction over a present continuing violation of the Act.

Every word is prospective; not one retrospective.

Besides, the Act itself clearly shows two remedies given for the misdemeanor; the one is the ordinary criminal remedy to punish for what has been done, and the other is the extraordinary and unusual remedy of preventing and restraining the commission of a misdemeanor now in action and being done which is a violation of the Act.

In the *Knight & Company Case,* Fuller, C. J. (156 U. S. 17), said that the Sherman Act

"only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the Act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce."

Northern Securities Co. v. United States, 193 U. S., 197, 346, Harlan, J.:

> "The Federal Court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company."

Harriman vs. Northern Securities Co., 197 U. S., 244, 289, Fuller, C. J., quoted with approval the comment of Judge Thayer on the decree in the latter's opinion in 128 Fed. 808:

> "The decree was *wholly prohibitory.* It enjoined the doing of certain threatened acts. * * * In its bill of complaint the United States prayed, among other things, for a *mandatory injunction* against the Securi-

ties Company, requiring it to recall and cancel the certificate of stock which it had issued, and to *surrender the stock* of the two railway companies in exchange for which its stock had been issued. *This prayer for relief was denied.*"

Swift & Co. vs. United States, 196 U. S., 375, 402, Holmes, J., said the decree issued.

"*restrains* such combinations *only* to the extent of *certain specified devices* which the defendants are alleged to have used and intend to continue to use."

In the *Northern Securities Case,* 128 Fed. Rep., 810, the court refused an affirmative decree or *mandatory* injunction, and in the Supreme Court Mr. Justice Harlan asserted that the decree granted below did not violate the right of property of the defendants.

In the present case Judge Sanborn (152 Fed. Rep. 297) evidently voices the same idea of the peculiarly limited relief the Sherman Act authorizes in equity, for he speaks of an injunction

"against the continuance"

and the "maintenance" of the evils complained of.

DECREES.

An examination of the decrees made in all the proceedings brought under Section 4 shows that the authority to grant relief other than the restraining of future violations of the act, has never been exercised by the courts, and that the existence of such authority has not been claimed by the Government.

In *United States vs. E. C. Knight Co.,* 156 U. S., 1, 17, Chief Justice Fuller said: (17)

> "The subject matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of *property which had already passed* and the suppression of the alleged monopoly in manufacture, by the restoration of the *status quo* before the transfers; yet the Act of Congress *only authorized* the Circuit Courts to proceed by way of *preventing and restraining* violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce."

In re Debs, 158 U. S. 564, 570. The decree enjoined the individual defendants from committing certain tortious acts.

United States v. Trans-Missouri Freight Association, 166 U. S. 290, 308.

The prayer of the petition was that the association be dissolved, and that the defendants be enjoined from continuing the combination.

After the decree of the Circuit Court dismissing the bill, the defendants voluntarily dissolved the association.

The Supreme Court held that this dissolution did not oust its jurisdiction and enjoined the defendants

> "from entering into or acting under any similar *agreement* in the future."

United States vs. Joint Traffic Association, 171 U. S., 505, 509. The prayer was for a decree declaring the agree-

ment void, and enjoining the defendants from operating their roads under the same.

The Circuit Court dismissed the petition, and its decree was affirmed by the Circuit Court of Appeals. The Supreme Court reversed this decision, directing the Circuit Court to proceed in conformity with its opinion, holding the association illegal.

Hopkins v. United States, 171 U. S. 578.

The Circuit Court granted the prayer of the bill for a decree dissolving the Kansas City Live Stock Exchange (82 Fed. 529, 533). The Supreme Court held the association legal, and reversed the decree.

Anderson v. United States, 171 U. S. 604.

The bill was filed against the Trader's Live Stock Exchange of Kansas City, and prayed for a decree dissolving the Exchange and enjoining the members thereof from entering into or continuing any similar combination (605).

The final decree is not reported, but the Circuit Court sustained the bill, and the Supreme Court reversed it and directed that the bill be dismissed on the ground that the association was legal.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211.

The Circuit Court of Appeals reversed the decree of the Circuit Court, dismissing the bill and instructing the latter to enter a decree,

> "perpetually enjoining the defendants from *maintaining the combination* in cast iron pipe *described* in the bill and

substantially admitted in the answer, and from doing any business *thereunder.*"

The Supreme Court modified this decree so as not to include combining in regard to contracts for selling pipe within the state, and affirmed the decree as so modified.

It will be remembered the agreement was to restrain competition and fix non-competitive prices.

In *Northern Securities Co. vs. United States,* 193 U. S., 197, 255, the Supreme Court affirmed the decree of the Circuit court, which was as follows:

"That the Northern Securities Company, its officers, agents, servants and employes be and they are hereby *enjoined* from *acquiring* or attempting to acquire further stock of either of the aforesaid railway companies.

"That the Northern Securities Company be *enjoined* from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein.

"That the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents be and they are hereby respectively and collectively *enjoined* from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies.

"And that they, together with their officers, directors, servants and agents, be likewise *enjoined* and re-

spectively *restrained* from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold.

"And that the aforesaid railway companies, their officers, directors, servants and agents, be *enjoined* from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

In the majority opinion, Mr. Justice Harlan said:

"The Federal Court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company."

From the report of *Harriman vs. Northern Securities Company,* 197 U. S., 244, 299, it appears that the directors of the Northern Securities Company voluntarily adopted a resolution distributing the shares of the Northern Pacific and Great Northern ratably among its stockholders.

On page 289 Chief Justice Fuller quoted with approval the following comment of Judge Thayer on the decree in his opinion (128 Fed. 808), refusing the application of Harriman *et al* for leave to intervene after the Supreme Court had affirmed the decree:

> *"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts.* * * * In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The Government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time."

Minnesota vs. Northern Securities Co., 194 U. S. 48. The case was removed by defendant from the State Court. The Circuit Court dismissed the bill. The Supreme Court reversed this decree and remanded the case to the State Court on the ground that a proceeding in equity under the Sherman Act could be instituted only in the name of the United States.

Swift & Company v. United States, 196 U. S., 375. The Supreme Court affirmed the decree of the Circuit Court, making perpetual a preliminary injunction.

The injunction as modified by the Supreme Court, included combining to obtain rebates from common carriers, and was as follows:

1. "And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this case, to restrain the said defendants and each of them, their respective agents and attorneys, and all other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from *entering into, taking part in, or performing any contract,* combination or conspiracy, the purpose or effect of which will be, as to trade and commerce in fresh meats between the several States and Territories and the District of Columbia, *a restraint of trade,* in violation of the provisions of the act of Congress approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' *either by directing* or requiring their respective agents to *refrain* from bidding against each other in the purchase of live stock; or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats as charged in the bill, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers as charged in the bill, the effect of which will be to restrict competition; or by any other *method or device,* the purpose and effect of which is to restrain commerce as aforesaid, and also from violating the provisions of the Act of Congress approved July 2, 1890, entitled 'An act to protect trade and com-

merce against unlawful restraints and monopolies,' by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of the trade and commerce in fresh meats among the several States and Territories and the District of Columbia, by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or of any of them, *receiving from railroad companies* or other common carriers transporting such fresh meats in such trade or commerce, either directly or by means of rebates, or by any other device, transportation of or for such means, from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other States and Territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be and the same is hereby made perpetual."

This decree, as Mr. Justice Holmes said (p. 402), "restrains such combinations only to the extent of *certain specified devices,* which defendants are alleged to have used and intend to continue to use."

Waters-Pierce Oil Company v. Texas, 212 U. S., 86, (106 S. W. 918).

This was an action at law brought by the State of Texas to cancel the permit of the Oil Company to do business as a foreign corporation, and to recover penalties for violations of the state anti-trust laws. The judgment cancelling the permit and imposing fines was affirmed by the United States Supreme Court on the ground that there was no merit in any of the Constitutional questions raised.

United States v. Jellico Mountain Coal & Coke Co., 46 Fed., 432. Held that the members of the Nashville Coal Exchange "should be enjoined from further violations of the law," (Sherman Act).

United States vs. Coal Dealers' Association, 85 Fed., 252, 258, 268.

A preliminary restraining order was granted prohibiting the members of the association from charging higher prices from persons not members than from members.

A motion to set aside this order was later overruled, and an opinion filed in which the court held the association to be in violation of the Sherman Act, and ordered that a preliminary injunction be prepared in accordance with the opinion.

United States v. Chesapeake & Ohio Fuel Co., 105 Fed. 93. The defendants were the members of an association of coal producers, and a fuel company, who had made a contract by which the fuel company agreed to sell all the coal of the members of the association at prices to be fixed by a committee of the association, and to account to the association for the same. The decree was that the defendants

> "* * * be *enjoined* from selling or shipping under this contract coal or coke into any state other than the state in which they reside, and the contract, in so far as it affects interstate trade and commerce, is declared to be void and illegal, and the combination of the defendants thereunder will be dissolved."

This decree was affirmed by the Circuit Court of Appeals in 115 Fed., 610.

THE DECREE ITSELF MUST BE PLAIN DEFINING EXACTLY THE THINGS WHICH THE DEFENDANTS ARE PROHIBITED FROM DOING.

The Supreme Court of the United States in *Swift & Company vs. United States,* 196 U. S. 375, 396, in considering the decree of the Court below in the above case, said:

> "We equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. * * * So modified, it (the decree) restrains such combination *only to the extent of certain specified devices which the defendants are alleged to have used and intend to continue to use.*"

In the *Addyston Pipe Case,* 175 U. S. 247, the decree below was also modified and made more specific.

The Supreme Court said in *Lacassagne vs. Chapuis,* 144 U. S. 124:

> "The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already."

Suggested Decree.

The Government has suggested that if the Court find against the defendants, it should enter a decree prohibiting them from carrying on interstate trade.

The answers readily suggested to this are:

First. The Sherman Act was passed to *further* and *protect* interstate trade, not to destroy it: Such a decree would destroy it.

Second. The authority and the only authority this Court has is under the Sherman Act, and that gives this Court the power to

"prevent and restrain *violations* of the Act;"

To engage in interstate trade is not a violation of the Sherman Act.

Third. Mr. Justice Brewer said in *New York City vs. Pine,* 185 U. S. 93, 99, that

"a Court of Equity is never active in relief against public convenience."

And in *Irwin vs. Dickson,* 9th Howard, 333, the Supreme Court said:

"An injunction is what is termed a 'transcendant' or 'extraordinary' power, and is therefore to be used sparingly."

The same court in *Joy vs. St. Louis,* 138 U. S., 47, said that

"considerations of the interests of the public are held to be controlling upon a Court of Equity."

The effect of a decree preventing the defendants from engaging in interstate trade in oil and its products would be unprecedented (not excepting the *Tobacco Case*), and its effects very far reaching. It would be a most serious blow and injury to the defendants but not to them alone:

To every producer whose oil is pumped to the reservoirs or tanks and held in storage, it would be a great injury and possibly a fatal one:

To the consumers of illuminating oil, it would double or triple the price of illuminating oil for the present, and restrict the free consumption of that illuminating oil which

so largely benefits the farmer and the laborer and persons in sparsely settled communities:

The same results would follow as to the by-products of oil:

It would put out of employment many thousands of men and women whose livelihood depends upon the interstate trade of the Standard Oil Company and its connections.

It would do much more harm than good.

Fourth. Even if Congress had delegated the power to this Court to issue such a decree (which we deny) it could not lawfully authorize the absolute prohibition of the individual defendants from engaging in their constitutional right in the business of oil among the States.

(See the discussion and the cases cited in the *Lottery Case,* 188 U. S. 364).

Rights of Citizens of the United States.

It is the right of every citizen of the United States to engage in interstate commerce, and to use all lawful and legitimate means to gain so much of that interstate trade as he or his partnership or corporation may. It is one of the natural indefeasible rights of an American citizen so to do.

The Constitution itself was framed, among other things, "to secure the blessings of liberty to ourselves and our posterity."

The Declaration of Independence declared
"as self evident"
truths
"that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

Article 4, section 2, provides that:
"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Fifth Amendment provided that,
"No person shall be * * * deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment added:
"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The courts have construed these provisions as giving to each citizen the fundamental privileges and immunities which belong of right to the citizens of all free Governments, and which have, at all times, been enjoyed by the citizens of the several states. Among these fundamentals are the right of a citizen of one state to pass through or to reside in any other state for the purposes of trade; to take, hold, use and dispose of property.

Each citizen is entitled to protection by the Government in his enjoyment of life, property and liberty, and this includes the fundamental right to engage in interstate trade.

In the *Slaughter House Cases,* 16 Wallace, 116, Mr. Justice Bradley said:

> "The rights of life, liberty and pursuit of happiness are equivalent to the rights of life, liberty and property. * * * For the preservation, exercise and enjoyment of these rights the *individual citizen as a necessity must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end, Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect, and a calling when chosen is a man's* PROPERTY *and right.* Liberty and *property* are not protected where these rights are arbitrarily assailed."

In the same case, page 97, Mr. Justice Feld said that amongst the things which the citizen had of right

> "must be placed the right to pursue a lawful *employment in a lawful manner* without other restraint than such as equally affects all persons."

In the *Butchers' Union Company v. Crescent City Company,* 111 U. S. 762, Justices Bradley, Harlan and Woods agreed that

> *'The right to follow any of the common occupations of life is an inalienable right."*

People v. Max, 99 New York, 386.,
Bertholf v. O'Reilly, 74 New York, 515.

In re Jacobs, 31 *Alb.* L. J., 85.

"The general rule is that every person *sui juris* has a right to choose his own employment and to devote his labor to any calling."

Cooley's Principles of Con. Law, p. 231.

In *Munn v. Illinois,* 94 U. S., 142, Mr. Justices Strong and Field held that,

"By the term liberty, as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means *freedom to go where one may choose,* and *to act in such manner,* not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; *that is to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment."*

In *Allgeyer vs. Louisiana,* 165 U. S. 578-589, the Court said:

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Smyth vs. Ames, 169 U. S. 522 (1897):

"By the Fourteenth Amendment, it is provided that no state shall deprive any person of property without

due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this amendment is now settled."

Santa Clara County v. Southern Pacific R. R., 118 U. S. 394-596:

Charlotte, Columbia & Augusta R. R. Co. v. Gibbs, 142 U. S. 386, 391:

Gulf, Colorado & Santa Fe Railroad Co. v. Ellis, 165 U. S. 150, 154.

Crutcher v. Kentucky, 141 U. S., 57, 58 (1890):

"To carry on *interstate commerce* is not a franchise or a privilege granted by the State; it is a *right which every citizen of the United States* is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of *depriving them of such right,* unless Congress should see fit to interpose some contrary regulation on the subject. * * *"

In *Thomas v. Cincinnati Ry. Co.,* 64 Fed. Rep., 803-819, Judge Taft said:

"Every man, be he capitalist, merchant, employer, laborer or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of com-

mon rights, the loss which is suffered is *damnum absque injuria.*"

Conner v. Elliott, 18th Howard, 491;
Ward v. Maryland, 12th Wallace, 418;
The Slaughter House Cases, 16th Wallace, 36;
Cooley's Const. Lim., p. 37 and notes.

Each citizen is, of course, subject to the police laws of the State, and also to the laws of Congress regulating commerce; and while the division line between the power of Congress to regulate and the right of the citizen to pursue interstate commerce is not easily defined, yet it is still true that this power of Congress must be used consistently with the recognition of the rights of the citizen to his fundamental and indefeasible rights above noted.

Monongahela Navigation Co. v. U. S., 148 U. S.

It is true that under the Sherman Act the Supreme Court of the United States has held in the Trans-Missouri and the Joint Traffic Association Cases that to some extent Congress could restrict, for the good of interstate commerce, the liberty of the citizen to contract, but it is respectfully suggested that that restriction of the liberty of the citizen was in the nature of the restraint of an unlawful thing; *i. e.,* Congress has an undefined but most extensive power of regulating interstate commerce, and the citizen cannot, by his contract, agree with some other citizen to restrain that regulation, and the contract that so restrains is *ipso facto* void, and *therefore* illegal; and Congress may so declare, and this because the very subject matter of the contract puts it peculiarly within power of Congress to regulate if it deems proper. The contract invades the territory of Congress, and hence subjects itself to Congressional regulation in the nature of the police laws.

The indefeasible right of the citizen to engage in interstate commerce is not denied, but, like his holdings of property

in the state, it is subject to the police laws as to property in the State, is subject to the laws of Congress as to the regulation of the use of this acknowledged right. No hard and fast line can be drawn to determine the boundary line between the indefeasible right of the citizen to engage in the trade and the power of Congress to regulate and control, and to some extent, restrain; but it is still indisputably true that both of these rights exist, are related to each other, have equal recognition in the Federal Constitution, and must receive reasonable treatment and recognition by the Federal Courts and Congress, and that Congress has not as yet restricted the percentage of interstate or foreign trade which any citizen of the United States may control.

Uses of Property.

The right of the citizen to be protected in his property includes all the elements which go to make it up. Thus the *use* of property is an essential element of ownership. Indeed, the property is of value only as one may use it. If one be restricted in its use—be prevented from using it—as he sees fit, his rights and property would amount to little and his liberty be controlled.

> *Slaughter House Cases,* 16 Wall., 36, 127:
> "The right of property includes the power to dispose of it according to the will of the owner."

THE FREEDOM TO USE AND SELL INCLUDES THE METHODS OF HOLDING TITLE WHETHER AS TENANTS IN COMMON OR JOINT TENANTS OR MERELY AS CESTUIS QUE TRUSTENT.

Congress cannot constitutionally prohibit individuals from uniting to secure community of interest, and in the Sherman Act has not attempted to prohibit individuals from uniting to secure community of interest in carrying on business.

In re Greene, 52 Fed., 104, Judge Jackson:
(p. 115).

"It is very certain that Congress could not and did not, by this enactment, attempt to prescribe limits to the acquisition, either by private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the *accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein,* or any part thereof, among the states, a criminal offense was committed by such owner or owners. * * * (p. 112) Congress may place restriction and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. *But Congress certinly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control and disposition of property."*

Northern Securities Co. vs. United States, 193 U. S. 19
361, *Brewer, J.*:

"Further, *the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.* If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any

acts of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall v. Great Northern Railway,* 161 U. S. 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: 'Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common.' ".

See Mr. Justice Holmes to same effect
Northern Securities Case, 193 U. S. 409.

In *Smiley vs. Kansas,* 196 U. S. 147, Mr. Justice Brewer said (456-457):

"*Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests,* and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a

community in one of the necessaries of life is substantially destroyed, *without any merging of interests through partnersip or incorporation,* is one to which the police power extends."

Here is the assertion that two or more competitors in PRIVATE trade may unite and form a partnership or corporation, and as such partnership or corporation for the future carry on trade. These are rights of citizens of the United States.

THE SHERMAN ACT DOES NOT PROHIBIT, BUT RECOGNIZES THE RIGHT OF THE INDIVIDUAL TO ASSOCIATE HIMSELF WITH OTHERS AS PARTNERS OR IN CORPORATIONS, AND THIS EXTENDS TO COMPETITORS WHO MAY UNITE AS A PARTNERSHIP OR ASSOCIATION TO CONTINUE TRADE.

In the *United States vs. Joint Traffic Association,* 171 U. S., 505, Mr. Justice Peckham said (567):

"* * * we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership."

In *Smiley vs. Kansas,* 196 U. S. 447, Mr. Justice Brewer said: (456-457)

"But a secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, *without any merging of interests through partnership or incorporation,* is one in which the police power extends."

Chesapeake & Ohio Fuel Company v. United States, 115 Fed., 610, 620, Day, Circuit Judge:

"Looking, then, to the contract in question, we find 14 of the coal producers of this district whose aggregate production is 5000 tons a day, entering into an agreement which, *without making a partnership,* undertakes to control the entire output of the several mines."

Northern Securities Co. vs. United States, 193 U. S. 197, 410. Holmes, J.:

"*A partnership is not a contract or combination in restraint of trade,* between the partners unless the well known words are to be given a new meaning invented for the purpose of this act."

And again on page 409 he says that the *size* of the corporation or its wealth or power

"*has nothing to do with the matter.*"

Oakdale Manufacturing Company v. Garst, 18 R. I. 484; 23 L. R. A., 639:

"It does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidation to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to

the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule."

In *Deuber Watch Case Company v. Howard Watch Co.*, 66 Fed. 637, 643, Judge Lacombe, for the Circuit Court of Appeals, said:

"The total amount of any given commodity which will be purchased by a community is limited, and when several sellers of such commodity, *enter into a combination in the form of a partnership,* and by ingenious advertising, or by *devices of business competition*, or by the offer of favorable terms to buyers, enlarge their own trade in such commodity, they restrain to some extent the trade of one or more of their competitors therein. But no one, not even the plaintiff in error, *contends that the statute forbids any such acts, although,* if the words be taken with absolute literalness, the phrase 'restraint of trade' is broad enough to cover them."

COMPETITION.

The means for the acquisition of trade which the law gives to every citizen of the United States and every one engaged in interstate commerce is competition. Competition, the law says, increases trade, and everyone who is a citizen of the United States may use competition to acquire a portion of the interstate trade. The word itself carries its meaning—no definition of it makes it clearer or adds to the ideas which the word itself suggests. It denotes strife—struggles with others. It means warfare for the same thing, and the end sought is that for which all strive.

Webster defines *competition*:

"The act of seeking or endeavoring to gain what another is endeavoring to gain at the same time;—"Common strife for the same object."

The strife is always to own exclusively the thing sought after and to own it, possess it to the exclusion of all other persons. If it be a prize, *i. e.,* a silver cup, I take it home as its sole exclusive owner, and no one may touch it unless I permit. If it be the intangible thing called business or trade among a dozen competitors, more than one may win a portion of it, but yet each strives for the whole, and the law does not limit the extent of the reward for each. The business or trade thus fought for is not a stationary, tangible thing like a silver cup; it is always in motion; it is the spring trade or the fall trade or the summer or winter trade, as it may be. Now there are 100 customers whose trade is sought for, and now 500. The customers themselves change. The locations of the customers vary, now here, and now there. Even in any one branch of trade, as, say the oil trade, now one sort of the product is demanded and now another. To compete for this trade is not *regrating* or *forestalling* or *engrossing* the village market for the necessaries of life.

These and many other characteristics of interstate trade in oil and business prove that its control of to-day does not insure such control next week, and he who wins, and therefore exclusively controls the spring trade, has not won the fall trade, and the danger of a monopoly is rendered less imminent and not dangerous so long as the doors of competition are not locked. Leave them open, and the law of trade corrects seeming errors.

Competition knows no limit except that the means used must be lawful. Academic treatises which talk of *unfair* com-

petition and *undue* competition and *unreasonable* competition find no authority in the settled decisions of England or of this country. Each individual's fundamental right is to compete for all the interstate trade if he so elects. His liberty so to do is not restricted by saying that he must use in the competition fair or reasonable skill or ingenuity or means of warfare. How could the law measure and define what was fair, what reasonable and what undue? God gives to one man unusual skill and aptitude in some branch of trade—or in many branches—say, like Edison. To limit him is to deny to the world at large the manifold advantages of his skill and ingenuity. Such skill will in a large degree give to him temporarily the control of whatever branch of trade he enters, but if honestly acquired, the law awards it. He may use any means which does not infringe upon the legal rights of his fellow citizens. If he uses any means which interferes with such right, this is unlawful, and he may not use it. But aside from this limitation, the choice of weapons and of means, is his own; the war is on, and each competitor may use all means which his wealth, his connections, his study, his superior skill or knowledge may give him.

This doctrine is nowhere more forcibly demonstrated than in the *Mogul Steamship Case,* L. R. 23, Q. B. 614; 1892, App. Case 25. The decisions in the Court of Appeals, in the House of Lords, and especially the reasoning of the separate judges in the Court of Appeals, show a thorough consideration of it.

The Supreme Court of the United States, in the *Trans-Missouri Case,* 166 U. S. 290, 334, seemed to recognize the authority of that case; and its doctrine that there is *no limit* to competition except unlawfulness, and that fair competition or reasonable competition are unknown qualifications at law, is approved by very many of the courts in our own country.

See to the same effect:

Transportation Company v. Standard Oil Company, 50 West Va. 615.

Huntley v. Simmons (1898), 1 Q. B. 181.

Allen v. Flood (1898), Appeal Cases I.

In *United States v. Freight Association,* 166 U. S., 290, 337, Mr. Justice Peckham quoted with approval the language of Judge Shiras' dissent from the decision of the Circuit Court of Appeals:

> "Competition, free and *unrestricted,* is the general rule which governs all the ordinary business pursuits and transactions of life, evils, as well as benefits, result therefrom. In the fierce heat of competition, the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world."

In *Allen v. Flood,* L. R., 1898, App. Cas., 1, 166, a case before the House of Lords, Lord Shand said the right to trade is subject to

> "competition which in itself is *lawful,* and which cannot be complained of where no *unlawful means* have been employed,"

and defined unlawful means as

> "*improper means,* by which I mean he used either *fraud* nor *violence.*"

In *Commonwealth v. Hunt,* 4 Metc. 111, 134, Chief Justice Shaw said:

> "Associations may be entered into the object of which is to adopt measures that may have a tendency to impoverish another,—that is, to diminish his gains and

profits, and yet, so far from being criminal or unlawful, the object may be highly meritorious and public spirited. *The legality of such an association* will therefore depend upon the *means to be used* for its accomplishments. If it is to be carried into effect by fair or honorable and *lawful means,* it is, to say the least, innocent; if by *falsehood or force,* it may be stamped with the character of conspiracy."

It would seem that this would be the rule. Its only limitation is *unlawfulness.* It could not be *free* and *unrestricted* if it were limited by fair or due or reasonable. It could not be full and free if it were limited by fair or due or reasonable.

Martel v. White, 185 Mass. 255, *infra.*

If you say that the limitation of competition is that which is unlawful, you have a definite, clear boundary defined. If you say, however, that the competition must be fair and the competition must be reasonable, who will determine what is fair and what is reasonable? Will each jury in each case have its own standard? Will each judge in each case set up his separate standard? If so, how can the trader regulate his competition, and how can he tell what he may do to-morrow in endeavoring to capture for himself a portion of, say, the summer trade?

The unlawful competition was outlined by Lord Bowen in the Mogul Case, 23 Q. B., Div. 614, as fraud, misrepresentation, intimidation, violence, molestation. He scouted the idea of fair or reasonable competition.

Among lawful means of trade regulation is division of territory.

Wickens vs. Evans 4 C. & P. 359.

Collins vs. Lord, L. R. 4 App. Cases 674.

Federal Right.

Now, as to the rights of the citizen of the United States to engage in competition for interstate trade, he gains them under the Federal Constitution. They are not granted by any state, nor can any state law limit or restrict them.

Crutcher v. Kentucky, 141 U. S. 47, 57.

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States."

If it is claimed this right of the citizen of the United States to compete for interstate trade is so limited, it must of necessity be by Federal Statute, or, at least, by Federal common-law, and neither has been shown; so that if it were necessary (which it is not) to so maintain, even competition unlawful in the states prior to 1890 was not unlawful under the Federal law for interstate trade.

Awards of Competition.

The law not only allows, but it awards, and by all means protects the winner in the acquisition and use of the prize he gains by competition. No matter how great the prize is, the law allows it and protects it because, unless that be so, competition would fail, for if the man who enters the lists and wins at the bout is not entitled to the trophy, there would be few lists organized and few men would submit themselves to the work and the labor and the inconveniences of the strife. Trade would be meaningless, and the incentive to industry and perseverance would be destroyed.

However large a percentage then of interstate trade the individual or the combine or the corporation or the trust may

gain, even though it should exceed eighty per cent, does not create a monopoly in violation of the Sherman Act unless *unlawful* means have been used to gain that result.

AUTHORITIES.

Montgomery Ward & Co. v. South Dakota Retail Association, 150 Fed. 413, 417.

A number of retail dealers organized an association and agreed not to purchase merchandise from wholesalers who sold to mail order houses.

They sent circular letters to wholesalers requesting them not to sell to mail order houses, and also circular letters to their own members informing them of the wholesalers who refused to comply with their request.

It was held that the plaintiff, who conducted a mail order business, was not entitled to enjoin the defendant from committing these acts, the court saying:

> "It must be remembered that the retail dealers and complainant are *competitors* in business, and that the retail dealers have committed the acts shown by the evidence, for the purpose of protecting their own interests, so that the retail dealers do not stand in the position that a combination of persons would who had no interest of their own to protect."

United States v. Atchison, T. & S. F. Ry. Co., 142 Fed. 176, 184; Phillips, District Judge:

> "The statute, by no expression or implication, interdicts the *increase* of a railroad's business by any *competition, however energetic, however grasping.* The essence of the charge in the bill of complaint is that the

defendant, by carrying in fact at a rate below that established and published, tried to get all the transportation it could of the designated products. In the Trans-Missiouri Joint Traffic Association Cases the reasoning of the court was that the agreement there involved directly tended to obstruct free competition. By the portion of the bill here touching the Sherman Act, it seeks to enjoin the defendant from doing the very act which, in the Trans-Missouri Joint Traffic case, the court held to be unlawful in repressing."

Lough v. Outerbridge, 143 N. Y., 271, 283; O'Brien, J.:

"*The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met and when it disappeared to resume the standard rates,* which, upon the record, did not at any time exceed a reasonable and fair charge. *I cannot perceive anything unlawful or against the public good in seeking by such means* to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of Lord Coleridge in the case of the *Mogul S. S. Co. v. McGregor, supra,* are applicable: 'The defendants are traders with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them exclusively rather than with their rivals. There follows that they may, if they see fit, endeavor to induce cus-

tomers to deal with them *exclusively by giving notice that* only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders."

Bohn Manufacturing Co. v. Northwestern Lumbermen's Association, 54 Minn., 223, 21 L. R. A., 337, Mitchell, J.:

(339)

"Now, when reduced to its ultimate analysis, all that the retail dealers, in this case, have done, is to form an *association* to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other non-dealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these:

They agree among *themselves* that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale."

(339-340)

"1. The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits, does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are, in and of themselves unlawful. 'Injury,' in its legal sense, means damage resulting from an unlawful act.

Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlaw-

ful, they may be highly meretorious. *Com. v. Hun,* 4 Met. 111, 38 Am. Dec. 346; *Mogul S. S. Co. v. McGregor,* L. R. 21 Q. B. Div. 544.

"2. If any act be lawful, one that the party has a legal right to do, the fact that he may be actuated by an *improper motive* does not render it unlawful. As said in one case, 'the exercise by one man of a legal right cannot be a legal wrong to another,' or, as expressed in another case, 'malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful.' *Heywood v. Tillson,* 75 Me. 225, 46 Am. Rep. 373; *Phelps v. Nowlen,* 72 N. Y. 39, 28 Am. Rep. 93; *Jenkins v. Fowler,* 24 Pa. 308."

"3. What one man may lawfully do singly, two or *more may lawfully agreet to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful.* The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case."

Macauley Brothers v. Tierney, 19 R. I., 225, 37 L. R. A. 455.

The members of a national association of plumbers agreed not to buy from wholesale dealers who sold to plumbers who were not members, and sent notices to this effect to all wholesale dealers.

The Court held that these acts did not constitute an unlawful conspiracy, following the Mogul Steamship Case. Chief Justice Mattson said: (459)

> "The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members *of the association to rid themselves of the competition* of those not members with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse, in legal contemplation for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of *diverting trade from a rival,* and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to *stifle competition.* Trade should be *free and unrestricted;* and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which *fraud, misrepresentation, intimidation, coercion, obstruction* or *molestation* of the rival or his servants or workmen, and the procurement of violation of contractual relations, are instances. * * *

(461) *"To maintain a bill on the ground of conspiracy it is necessary that it should appear that the object relied on as to the basis of the conspiracy, or the means used in*

accomplishing it, were unlawful. What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not members, which, as we have seen, is not unlawful. The means taken to accomplish that object were the agreement among themselves not to deal with wholesale dealers who sold to those not members of the associations, and the sending of notices to that end to the wholesalers. This, as we have also seen, was not unlawful. Hence, it follows that, as the object of the combination between the members of the association was not unlawful, nor the means adopted for its accomplishment unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial."

West Virginia Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 56 L. R. A. 804, (1900).

The plantiff corporation engaged only in transporting oil by means of pipe lines, brought an action of tort against the Standard Oil Company. The first count of the declaration charged that the Standard Oil Company had procured the construction of a pipe line through the territory which had formerly patronized plaintiff, and had refused to purchase or refine or receive in its pipe lines any oil shipped through plaintiff's line, thereby ruining plaintiff's business and securing a monopoly of the business of refining and transporting oil. A demurrer to this count was sustained. A second count alleging in substance that the defendants conspired to destroy plaintiff's business, without showing the justification of competition for plaintiff's acts, was held not demurrable.

Brannon, J., said: (807, 809, 810)

"There is no right better established under the law *of business than the right of trade competition. Mogul S. S. Co. v. McGregor,* L. R. 21 Q. B. Div. 544, L. R., 23 Q. B. Div. 598.; *Huttley v. Simons* (1898), 1 Q. B. 181. These companies were owned by the same men. Their interests were common—one buying, refining and selling oil; the other transporting it. I mean the defendant companies. Had they not a right to *work together to promote the common interests*—even to *conspire to draw to themselves from* other competitors' business, so they did no unlawful act? The count charges an arrangement designed to form a monopoly to control or dominate the business of purchasing, producing, refining and selling oil. Everyone has a right to enlarge his business, even though, by means of greater capital, superior facilities and capacity he monopolizes business and injure competitors. If the business is lawful, so that it violates no state law, even if it overshadow others, who can prevent it in a *free country of constitutional law?*

* * * * * * *

"Now these companies were furthering their own interests in lawful competition with others. If they possessed the lawful right above stated, what matters it that they did have the intent to cut down the business of others, or that they did cut it down and injure others, though they did this that they might themselves fatten? So far this first count charges only the exercise by the defendants of a right of constitutional liberty, accorded alike to all—simply the right of advancement in legitimate business—self preservation, we may say. That in these days of sharp, ruinous competition some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? Will it always be so? The evolution of the fu-

ture must answer. What its evolution will be in this regard we do not yet know, but we do know that thus far the law of the survival of the fittest has been inexorable. * * *

"I understand the law to be as follows: One may without liability induce the customers of another to withdraw their custom from him, in order that the former may himself get the custom, there being no contract; and it is no matter that the other party was moved by express intent to injure him; motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously with intent to injure another, it is actionable, if loss ensue. Nor is it material in the latter case that there was no binding contract between the business man and his customers. He cannot interfere even for his own benefit, if there is a contract."

Martell v. White, 185 Mass., 255, 64 L. R. A., 260, 1904, Hammond, J., said:

"The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the *general and natural* laws of business to have their *full and free operation,* and that this end is best attained when the trader is allowed, in his business, to make *FREE use* of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or, in the words of Bowen, L. J. in the Mogul S. S. Case, L. R. 23 Q. B. Div. 615, may adopt the 'expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future.' In these and many other obvious ways he may secure the

customers of his rival, and build up his own business to the destruction of that of others; and, so long as he keeps within the operation of the laws of trade, his justification is complete."

In *Vegelahn v. Guntner,* 167 Mass., 92, 106, Mr. Justice Holmes said:

"* * * the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. *Commonwealth v. Hunt,* 4 Met. 111, 134."

In the case cited, *Commonwealth v. Hunt,* 45 Mass. (4 Met.) 111, 134, Chief Justice Shaw said:

"We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another,—that is, to diminish his gain and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public-spirited. The legality of such an association will, therefore, depend upon the means to be used for its accomplishment. If it is to be carried into effect by *fair or honorable and lawful means,* it is, to say the least, innocent; if *by falsehood or force,* it may be stamped with the character of conspiracy."

Allen v. Flood, L. R. 1898, App. Case, 1, 166; Lord Shand, addressing the House of Lords, said:

"* * * a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition—*competition, which is in itself, lawful*—and which cannot be

complained of where *no unlawful means* (in the sense I have already explained) have been employed. The matter has been settled insofar as competition in trade is concerned by the judgment of this House in the Mogul Steamship Co. Case."

His Lordship had defined illegal means, on page 162, as "*improper means,* by which I mean that he(the defendant) used neither *fraud* nor *violence.*"

In *Ajello v. Worsley,* 1898, 1 Ch. 274, 280, Mr. Justice Stirling said, that a seller

"* * * is entitled to make the offer at any price he chooses, whether remunerative or not; it may *be worth a trader's while to sell* some goods at a loss so long as he is able to sell other goods at a countervailing or more than countervailing profit."

The effect of the late English decisions is thus summarized by Sir Frederick Pollack in his treatise on the Law of Torts (8th Ed.) page 152:

"A trader can complain of his rival only if a definite exclusive right, such as a patent-right, or the right to a trade-mark, is infringed, or if there is a wilful attempt to damage his business by injurious *falsehood* ("slander of title") or acts otherwise *unlawful* in themselves. Underselling is not a wrong, though the seller may purposely sell some article at unremunerative prices to attract custom for other articles; nor is it a wrong even to offer advantages to customers who will deal with oneself to the exclusion of a rival.

"To say that a man is to trade *freely,* but that he has to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract their

business to his own shop, would be a strange and impossible counsel of perfection.

"To draw a line between *fair and unfair* competition, between what is reasonable and unreasonable, *passes the power of the courts.* Competition exists where two or more persons seek to possess or enjoy the same thing. It follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition. There is 'no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself.' "

Mogul Steamship Company vs. McGregor, Law Reports, 23, Queen's Bench, Page 598, Court of Appeals.

Lord Esher, Bowen and Fry sitting.

The plaintiffs were a shipping company owning certain steamships, and among others the Afghan and the Pathan, and they were employed in the China trade.

The defendants were ship owners trading between China and London, and they formed themselves into an association for the purpose of keeping up the freights in the tea trade between China and Europe, and securing that trade to themselves by allowing a rebate of five per cent. to all shippers who shipped tea for Europe in their vessels only.

The plaintiffs were admitted to this conference for the year 1884, but were then refused admission for the subsequent years. The result was that when the plaintiffs attempted to get a cargo of tea to ship from China to Europe the defendants underbid them for freight rates, took from

them the tea trade and practically drove them out of the business of transporting tea from China to Europe. Their purpose the Court found was (page 601)

> "to prevent any of those whom they did not admit to be parties to the agreement from being able to load tea at Hankow with any profit. Thus they would after a time drive any of such parties out of the carrying trade from Hankow or Shanghai to England, and then they, the confederated firms, could maintain the high freights which a free competition would inevitably lower."

The Court then, on page 614, discusses the question of what a trader's legal rights are, and they state the law in this way:

> Lord Bowen: "What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence: *Tarleton vs. McGawley;* the obstruction of actors on the stage by preconcerted hissing: *Clifford vs. Brandon, Gregory vs. Brunswick;* the disturbance of wild fowl in decoys by

the firing of guns: *Carrington vs. Taylor* and *Keeble vs. Hickeringill;* the impeding or threatening servants or workmen: *Garret vs. Taylor;* the inducing persons under personal contracts to break their contracts: *Bowen vs. Hall, Lumley vs. Gye,* all are *instances of such forbidden acts.* But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the *bitter end* a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill will or a *personal intention to harm,* it is sufficient to reply (as I have already pointed out) that there was here no *personal intention* to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is *not fair or reasonable.* The offering of reduced rates by the defendants in the present case is said to have been 'unfair.' This seems to assume that, apart from fraud, intimidation, molestation or obstruction,

of some other personal right *in rem* or *in personam,* there is some natural standard of *'fairness'* or *'reasonableness'* (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a 'fair freight,' whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the defienition of a 'fair freight?' It is said that it ought to be a normal rate of freight such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by *driving* competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that *Law Courts had a right* to say to them in respect of their competitive tariffs, 'Thus far shalt thou go and no further.' To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. * * *

"The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like maner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capi-

talists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company, limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence—to use a technical expression —of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides."

His Lordship summed up on page 620 as follows:

"The substance of my view is this, that competition, however *severe* and egotistical, if unattended by

circumstances of dishonesty, intimidation, molestation or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial 'reasonableness,' or of 'normal' prices, or 'fair frenghts,' to which commercial adventurers, otherwise innocent, were bound to conform."

Lord Fry held the same views, and in another elaborate opinion he put the case on the same grounds as did Lord Bowen.

On page 625 he said:

"Now, I know no limits to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals or good manners. To draw a line *between fair and unfair competition, between what is reasonable and unreasonable, passes the power* of the Courts. Competition exists when two or more persons seek to possess or to enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition."

This case went to the House of Lords, Privy Council, and is reported in the Law Reports Appeal cases 1892, page 25. There Lord Halsbury, the Lord Chancellor; Lord Watson, Lord MacNaghten, Lord Bramwell, Lord Morris, Lord Field, Lord Hannen, all agreed in sustaining the decision of the Court of Appeals by Lord Bowen and Fry.

Lord Halsbury mentions the underbidding for freight at Hankow, and on page 37 he says:

"My Lords, after all, what can be meant by 'out of the ordinary course of trade?' I should rather thank, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

I entirely adopt and make my own what was said by Lord Justice Bowen in the Court below: 'All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go and no further.' "

Lord Morris said, page 49:

"The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons."

Again on page 50 Lord Morris said:

"Again, what one trader may do in respect of competition, a *body or set of traders can* lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. *I entertain no doubt* that a

body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure the trade of competitors, provided they do no more than is incident to such motive object, and use no *unlawful means.*

"In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called *'fair'* intermediate between lawful and unlawful. The question of 'fairness' would be relegated to the idiosyncrasies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another."

Judge Sanborn's Opinion in the Continental Tobacco Case.

In *Whitwell vs. Continental Tobacco Company,* 125 Fed. Rep., 454, the Circuit Court of Appeals of this Circuit, Sanborn, Fair and Vandevanter sitting, Judge Sanborn, delivered the opinion.

The facts were that the Continental Tobacco Company was a manufacturer of tobacco which owned and controlled most of the valuable and leading brands of plug and chewing tobacco in the United States (p. 456).

"And fixes the market prices thereof."

The Tobacco Company, then,

(a) Controlled most of the valuable and leading brands of plug and chewing tobacco in the United States; and,

(b) It was admitted that the Tobacco Company fixes the market price of such tobacco.

The custom of the Tobacco Company was to deal with persons as follows:

To each customer it made an allotment at a price at which the customer could make no profit. They required each purchaser to refrain from dealing in plug or chewing tobaccos made by any competitive manufacturer. If the purchaser complied with this requirement they reduced his allotment to the amount he was able to sell, and paid back to him such a percentage of the price that the handling of the goods was made profitable; but they refused to do this if he dealt with the competitor.

The plaintiff was an independent tobacco manufacturer competing with the Tobacco Company, and he brought an action under the Sherman Act for damages. The Court said:

"The test of the legality of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the states. If its necessary effect is to stifle or to *directly and substantially* restrict free competition, it is a contract, combination or conspiracy in restraint of trade, and it falls under the ban of the law. * * *

"If, on the other hand, it *promotes* or but incidentally or indirectly restricts competition, while *its main purpose* and chief effect are to *foster the trade* and *increase the business* of those who make and operate it, then it is not a contract, combination or conspiracy in restraint of trade within the true interpretation of this act, and it is not subject to its denunciation. * * *

It is admitted that the practice of the defendants was not only an attempt, but a successful attempt to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by Sec. 2 of * * * (the Sherman Act)? If so, no interstate commerce has ever been lawfully conducted since that act became a

law, because every sale and every transportation of the article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is *the very root of all competition therein.* Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself and to *exclude* others from a part of that trade, and if he may not do this he may not compete with his rivals. All other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly.

The purpose of the Act of July 2nd, 1890, was, however, to *prevent the stifling of competition,* not to destroy it, or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared * * * have a reasonable construction. The purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive *similar* interpretations. The Supreme Court has declared that the true construction of the first section is that no contract, combination or conspiracy is denounced by it

unless its *necessary* effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made *illegal or punishable* by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states * * * It was not—it could not have been—the purpose or the effect of the second section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave other competitors free to make successful endeavors of the same kind. * * *

An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes or but indirectly or incidentally restricts competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made and was not made illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states."

In *Phillips vs. Iola Portland Cement Co.*, 125 Fed., 593, 594, it is said by the same judge:

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract,

combination or conspiracy challenged under he anti-trust law is the *direct effect* of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it *promotes,* or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states."

The Supreme Court refused a *certiorari* in this case. See 192 U. S., 606.

MONOPOLY.

What is a monopoly under section two of the Sherman Act?

The Supreme Court has not defined it. Loose definitions in text-books and especially encyclopedias are mislead-

ing. The history of it is shown in the old English text-books:

First Russell on Crimes:

"Monopolies are much the same offense in other branches of trade that engrossing is in provisions. * * * They are said to differ only in this, that monopoly is by patent from the King, engrossing by the act of the subject between party and party; and have been considered as both equally injurious to trades and the freedom of the subject, and therefore equally restrained by the common law.

"By the common law, therefore, those who are guilty of this offense are subject to confinement and imprisonment, the offense being *malum in se* and contrary to the ancient fundamental laws of the kingdom."

In *Blackstone's Commentaries,* Book 4, * page 159, it is said:

"Monopolies are much the same offense in other branches of trade that engrossing is in provisions; being a license or privilege allowed by the King for the sole buying and selling, making, working or using of anything whatsoever whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before."

In *First Hawkins Pleas of the Crown,* 8th Ed., p. 624:

"A mononpoly is an allowance by the King to a particular person or persons of the sole buying, selling, making, working or using of anything whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before. Monopoly differs from engrossing only in this: That monopoly

is by patent from the King, and engrossing by an act of the subject between party and party."

Bacon's Abridgement, Title of Monopoly:

"A monopoly is described by My Lord Coke to be an institution or allowance by the King by his grant, commission or otherwise to any person or persons, bodies, politic or corporate, of or for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies, politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.

"Monopoly and engrossing differ only in this: That the first is by patent from the King and the other by act of the subject between party and party; but are both equally injurious to the trade and the freedom of the subject; therefore are equally restrained by the common law."

See Judge Fields' Opinion, *Slaughter House Cases,* 16th Wallace, 101.

In the *Butchers' Union Case,* 111 U. S., 755, Mr. Justice Field said:

"A monopoly is defined 'to be an institution or allowance from the sovereign body of the state by grant, commission or otherwise to any person or corporation for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies, politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.' All grants of this kind are void at common law because they destroy the freedom of trade, discourage labor and industry, restrain persons from get-

ting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. *They* are void because they interfere with the *liberty* of the individual to pursue a lawful trade or employment."

The Supreme Court of the United States in the *Charles River Bridge Case,* 11 Peters, 607, states that the monopoly as understood in law is

"An exclusive right granted to a few of something which was a part of the common law."

Fields, J., gave the same definition in the *Slaughter House Case,* 16 Wallace, 102.

McKenna, J., in *National Cotton Oil Co.,* 197 U. S., 129, said that a monopoly is now

"understood to include 'a condition produced by the acts of mere individuals.' Its *dominant thought* now is, to quote another, 'the notion of *exclusiveness* or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' "

Holmes, J., in *Northern Securities Case,* 193 U. S., 409, again emphasized the idea that monopoly was exclusion.

In the time of and prior to Lord Coke, engrossing, regrating and forestalling were each crimes at common law, and related to the mere necessaries of life. The reason they

were held to be crimes was that the public were prevented from acquiring the *necessaries* of life at the prices fixed by law of competition. The law embraced only the things which one went to the market to buy, and, as Blackstone says (4th Book, *158) as to *forestalling.*

> "which practices make the market *dearer* to the fair trader."

As to Regrating (4th Book, *158):

> "For this also enhances the price of the provisions. * * *"

As to Engrossing (4th Book, *159):

> "This must, of course, be injurious to the public by putting it in the power of one or two rich men to raise the price of provisions at their own discretion."

It was then to protect the public from artificial and high prices for the things they ate, and this was the reason for and the foundation of that law.

But as to the trades and occupations in life, the Courts held each Englishman (like each American) had, of right, access thereto, and, therefore, when the Crown granted a monopoly of the exclusive right to make and sell playing cards, the Court held the Letters Patent were void; not because the price of playing cards was increased, but *because* all other Englishmen were excluded from making and selling the same. It was solely on the *exclusive* feature that such grants were held void.

Strictly speaking, *forestalling, engrossing* and *regrating* were a species of crimes at common law, relating solely to the purchase and sale of provisions or the necessaries of life.

A *monopoly* was only the grant by the King of an exclusive right to carry on a certain trade which theretofore was common to all, thereby excluding all others from such trade.

They are two distinct independent offenses arising out of distinct circumstances and founded on distinct and independent reasons.

Remembering this, and also remembering that the Federal Courts look to the common law for a definition of words having there a known significance, we may at least assert that:

> Any definition such Courts give of monopoly will at least embrace the following elements:
>
> (1) The idea of exclusiveness—that one set of men exclude or keep out of a certain trade or business all other, or at least, some other men desiring to enter it;
>
> (2) That such exclusion is unlawful or is effected by unlawful means;
>
> (3) As the Sherman Act is passed avowedly to further competition, and as the very life of competition demands that the competitor who wins is lawfully entitled to the prize, that if the exclusion of others is only because of successful competition, it is not unlawful.

Pettibone vs. United States, 148 U. S., 197, 203, Chief Justice Fuller:

> "The courts of the United States * * * *resort to the common law for the definition of terms* by which offenses are designated."

United States vs. Sanges, 144 U. S., 311:

"This statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived. * * * as aids, therefore, in its interpretation, *we naturally turn to the decisions in England.*"

Ex parte Wells, 18 How., 307, 321:

"When a term is used in our Constitution or statutes which is known at the common law we look to that system for its meaning."

United States vs. Trans-Missouri, 58 Fed. Rep., 82, Sanborn, J.:

"A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to or the exclusive control of that trade; and (2) the exclusion of all others from that right or control."

It is grasping the control of a trade by a few persons who have combined and conspired with each other for the purpose and with the intent and with the idea of gaining by all means the power to control for the maleficient purpose of fixing the price of the article dealt in. It involves the use of unlawful means—trickery and fraud stamped by the law as criminal. It is in marked contrast to the *legitimate growth of a lawful business.*

The thing the monopolist seeks for and gains is the ability to control prices and suppress competition; while the thing the competitor seeks for is the *extension of his trade by lawful means.* This extension may give control of trade and

enable one to fix prices, but it is the reward of competition which the law allows. The successful trader may not gain such absolute control, and if he does will hardly continue to hold it if the door of competition is left open.

The mere ability of a merchant to fix the price at which he will buy and sell any given line of goods is his individual right, and if he has partners, of his associates and of the partnership. So long as he restricts that right to fixing his own price at which he will buy or sell this line of goods he is strictly within his lawful rights and no one may complain. Indirectly the price that he pays may affect the market price, and probably will, but in so far as he merely fixes his own prices and does not seek by devices and tricks and any unlawful means to fix the price for others he is not committing an unlawful act.

SHERMAN ACT DOES NOT FORBID CORPORATIONS OR COMBINATIONS COMPETING FOR INTERSTATE TRADE.

Section 2, like section 1, does not *denounce* combinations in interstate trade. It does not denounce or forbid corporations, big or little, to enter into interstate trade. It impliedly sanctions both combinations and corporations so engaging in interstate trade, for it only denounces such combines that monopolize or attempt to monopolize the trade. Indeed, it may be, as has been said, that sections 1 and 2 unite and form one. The restraint of trade tends to monopolize, and monopoly is itself restraint of trade. Some of the opinions, as in the *Addyston Pipe Case,* almost interchangeably use the words "restraint of trade" and "monopoly," and treat them as synonymous.

See also Judge Holmes, 193 U. S., 408;
Judge Putnam, 55 Fed. Rep., 640;
Judge Sanborn, 125 Fed. Rep., 454.

Continuity and Stability.

Monopoly implies *continuity* and *stability*—not a mere shifting, uncertain control, here to-day and *gone to-morrow, but a thing which abides; a tyrant whose grip endures.*

The successful merchant who monopolizes the sale of sealskin coats in St. Louis for the month of January, 1909, is not a danger to the public because competition being open he must still compete for the February trade, and that of January, 1910; and if his January triumph in 1909 was the legitimate result of his competition, the law not only allows it, but approves it.

The same is true of all trade, including that in oil. One may win and lawfully keep all of the spring trade, but if he leaves open competition for that which is to follow, he cannot be charged as an unlawful monopolist.

This element of monopoly was in the Addyston Pipe Case, the Beef Case and the Railroad Cases. It was a continuous power gained by the joining of competitors who while actually remaining nominally competitors, or independents, by contract restricted competition.

Crime.

Monopoly necessarily carries with it the idea of crime. To be a monopolist is to be a criminal. It denotes wrongdoing. The successful merchant who gains as the reward of competition 60 or 80 or 90 per cent of, say, the oil trade of 1906, is not a monopolist or a wrong-doer by reason thereof, any more than the fur merchant who gains the January trade in sealskins.

Partnerships and Corporations.

The act does not, as we have seen, prohibit partnerships or corporations or trusts from engaging in interstate trade; indeed, it impliedly recognizes and approves of such activity; and the thing which it prohibits is the individual person or the corporation or the combination from seeking by *unlawful* means and for maleficient purposes, the control of *interstate trade.*

Percentage of Trade Successful Merchant Gains.

The Sherman Act in no one of its sections attempts to limit the percentage or quantity of trade which any person or partnership or corporation or trust may gain and carry on. It would be foreign to the fundamental principles of our Government to restrict the liberty, the ingenuity, the perseverance, the skill and labor of any one or more of its citizens. Each man may lawfully, under state laws which are beyond the control of Congress, form a partnership, and now generally, under broad statutes form corporations for the purpose of doing any lawful thing by lawful means.

Judge Taft's Definition of Monopoly.

Judge Taft, not indeed from the Bench, where, I agree, the authority would be more pronounced, but with great solemnity in his inaugural address on March 4th, 1909, said, speaking of American business and the stability and certainty of the same, that any plan determined upon by the Federal Government

> "must include the right of the people to avail themselves of those *methods of combining capital and effort deemed necessary to reach the highest degree of economic ef-*

ficiency, at the same time *differentiating* between combinations *based* upon *legitimate economic reasons,* and those *formed* with the *intent* of creating monopolies and *artificially* controlling prices."

Judge Taft, on August 19th, 1907, at Columbus, Ohio, referring to the Sherman Act, said:

"The Supreme Court of the United States has not defined what a monopoly under this section of the anti-trust law is. I conceive that it is *not* sufficiently defined by saying that it is the *combination* of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There *must be something more* than the mere union of capital and plant before the law is violated. There must be some use by the company of the comparatively great size of its capital and plant and extent of its output *either* to *coerce* persons to buy of it rather than of some competitor, or to coerce those who would compete with it to *give up their business.* There must, in other words, be an element of duress in the conduct of its business towards the customers of the trade and its competitors before mere aggregation of plant becomes an unlawful monopoly."

OTHER AUTHORITIES.

Bouvier's Law Dictionary defines "monopoly" as:

"The *abuse* of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise to the detriment of the public."

In *Wharton's Criminal Law,* Vol. 2, page 219, Sec. 1369, he states that to constitute a monopoly there must be shown

"*Coercive* or *fraudulent* means or the absorption of an entire necessary staple."

United States vs. Patterson, 55 Fed. Rep., 605, 638, Putnam, Circuit Judge:

"Ordinarily a case cannot be made under the statute unless the means are shown to be *illegal,* and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market."

United States vs. American Tobacco Co., 164 Fed., 700, 722, 727. Judge Ward, in his dissent, said:

"It remains to inquire whether the American Tobacco Company and its controlled companies constitute a monopoly of or attempt to monopolize a part of the foreign commerce or commerce between the states under the second section of the Sherman Act. As this section prohibits a monopoly of or an attempt to monopolize any part of such commerce it cannot be literally construed. So applied, the act would prohibit commerce altogether. The first and second sections must be read together, and I think mean the same thing; the second adding nothing except to extend the prohibition to individuals who, without combination, monopolize or attempt to monopolize. *It must* be understood to *prohibit monopolies* or attempts to monopolize *brought about by the unlawful means contemplated in the first section,* viz., the purpose to restrain trade by *preventing competition* and preventing others from participating in it. The third

section of the act bears out this construction, because it does not mention monopolies, or attempts to monopolize in the territories or District of Columbia, where the jurisdiction of the United States is supreme in all things, and it can hardly be that Congress intended to declare innocent acts committed within them which it pronounces crimes if committed in the states."

West Virginia Transportation Company vs. Standard Oil Company, 50 W. Va., 611 (1900):

"This monopoly * * * is the act of persons and corporations, by union of means and effort, drawing to themselves, in the field of competition, the lion's share of trade. This is not monopoly condemned by law."

Monopoly Under the Sherman Act.

The word "monopoly" has at least two meanings: The one is that which includes lawful monopolies, such as patents—a trade governed by a secret process for making the article of commerce: A temporary control of the market in any one line gained by lawful means under competition. The other and *invidious* sense is the control or engrossing of the market by unlawful means. In either case, except perhaps a patent, the basis of monopoly is contractual.

Every trader, like every professional man, monopolizes a certain portion of the trade or profession; that is, he has the exclusive use and control of that certain portion, and he allows no one to interfere with that exclusive use and control if he can help it, and this is a necessary law of trade, without which trade could not be carried on.

But the Sherman Act does not make any attempt to monopolize

> "any part of trade or commerce among the several states"

a misdemeanor. Literally carried out and giving a broad meaning to the word "monopoly," as it was argued in the Trans-Missouri and the Freight Association cases, would include every act of a trader in the acquisition of any part of the trade or commerce among the several states. Its literal construction, therefore, is impossible.

The title of the act is to protect trade and commerce and to protect them against

> "unlawful restraints and monopolies."

A construction of Section 2 which literally enforced each of its words would not protect, but destroy interstate trade, and would prevent ordinary corporations and partnerships and individuals from engaging in the same, because each man who enters that trade does seek to exclusively seize some portion of it.

In the *Joint Traffic Association cases,* 171 U. S., 566, the Court said that the argument had been pressed that the Sherman Act literally construed

> "limits the freedom and destroys the property of the individual * * * and that ordinary contracts and combinations which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet under the construction adopted they are illegal."

The court, on page 567, calls attention to the numerous instances of the organization of mechanics and their business,

the formation of a corporation by several, a contract of partnership, the purchase by one wholesale merchant of the product of two producers, etc.

All these were cited by counsel as in support of the proposition that all restraints of trade were declared illegal under section one of the Sherman Act, and that such scope would include the simplest kind of trade. The court answered (567):

> "* * * that the formation of corporations for business or manufacturing purposes has never to our knowledge been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer restrained commerce or trade within any legal definition of that term. And the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act. * * * In *Hopkins vs. United States,* decided at this term (Post, 578), we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon

interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby effect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a *reasonable construction* or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the edcision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned or by any other decision of this court."

TEST OF MONOPOLY.

It is respectfully submitted that the test as to whether a combination has created a monopoly in interstate trade and restrained interstate trade is this: Has the combination gained by using unlawful means—not whether here or there in a vast business, improper things have been done, but were the improper things the prevailing, controlling, and practically exclusive means by which success was gained.

If this is not proven, (as it is not,) then the inquiry ends.

Assume arguendo that it is proven, then the next inquiry is, were the defendants doing unlawful things when the petition was filed? If so, but only if so, as to those unlawful things then being done, an injunction will issue.

RESTRAINT OF TRADE.

The contracts or combinations in restraint of interstate and foreign trade or commerce denounced in the first section of the Sherman Act are contracts or combinations between independent persons or corporations, actually competing with one another, whereby such competition is avoided, prices controlled, profits unduly enhanced, etc.

PURCHASE OF COMPETITORS AND SIZE AND GROWTH OF BUSINESS.

THE SHERMAN ACT DOES NOT PROHIBIT THE PURCHASE BY ONE COMPETITOR OF THE PROPERTY OF THE OTHER; NOR THE GROWTH BY THE LEGITIMATE MEANS OF COMPETITION OF THE DEALER'S BUSINESS, HOWEVER LARGE THAT GROWTH MAY BE; NOR DOES IT LIMIT THE PERCENTAGE OF INTERSTATE TRADE ANY TRADER MAY GAIN; NOR DOES IT FORBID COMBINATIONS OR CORPORATIONS ENGAGING IN INTERSTATE TRADE.

In the *Northern Securities case,* 193 U. S., 197, Mr. Justice Brewer, one of the majority, on page 361, said:

> "Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company, he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him, through that ownership a control over both companies. In other words, the right

which all other citizens had of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company."

Mr. Justice Holmes said in the same case, on page 409:

"But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and of the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road."

In *Pearsall vs. Great Northern Railway Company,* 161 U. S., 644, the Supreme Court said (p. 671) in reference to the rights of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Company:

"Doubtless these stockholders could lawfully acquire by individual purchases a majority or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control."

In *Allgeyer vs. Louisiana,* 165 U. S., 578; in the *Slaughter House cases,* 16th Wallace, cited *supra,* liberally quoted it is held that the right of each individual citizen to engage in interstate trade; to seek for all the trade that he can get; to choose his occupation in life;—are among the inalienable rights granted to him by the Federal Constitution. He has the right to the pursuit of happiness; to the possession of liberty and of property; and all these he has a right to have protected by the legislation of Congress. He may not be deprived of any of them without due process of law. Among

these rights are those of the formation of partnerships and the other means of carrying on trade and commerce, and it may well be said the right to *join with others in the organization under* state laws of corporations for the pursuit of trade.

Nearly every case decided under the Sherman act reiterates the proposition that the purpose of the act was to protect and further competition, and to stifle competition was to violate the act. Again and again is this stated and reiterated, and any student of the cases under the Sherman act will approach the consideration of any dispute concerning it with the certainty that the purpose of the Sherman act was to promote competition and to prevent competition being stifled. The purpose was to protect trade and not destroy it, and as the title says, to protect the trade from unlawful combinations and conspiracy. The title and the body of the act all assume that there may be combinations and conspiracies which are not unlawful, and the test of their unlawfulness is: Are they the result of lawful competition or were they gained by unlawful competition? Their size and the percentage of the business they do are comparatively unimportant; their power to temporarily fix prices for a portion of trade is unimportant. The underlying test is: Did they gain that power as the result of lawful competition? If they did, they are rewarded and praised by the Sherman act, and not denounced and villified as criminals. Of dozens of expressions of opinion that the purpose of the Sherman act was to promote competition we hereinafter cite a few:

Size or Wealth of Corporation in Trade Unimportant.

The size or wealth of the corporation or the combination or the trust is unimportant, because no limit is fixed under the Sherman Law as to the wealth or power of any

corporation or group that may engage in interstate trade. No limit is put to the time during which they may engage in the interstate trade. No limit is put to the number of those who may combine.

It has already been pointed out that the Sherman Act is not directed against corporations or combinations or trusts. It names "Corporations" but once, and that is in section 8, and it puts corporations in the same class with an individual or a combination or an association. The title says that the purpose of the act is to protect trade against unlawful combinations and conspiracies, and while the title in Federal legislation will not control the body of the act, and it was so held in the Freight Association case and the Trans-Missouri case, yet it is still true that it may be referred to and the words of the act read in the light thereof, although if the words of the act are plain the title cannot control it.

United States vs. Palmer, 3 Wheaton, 610; Marshall, C. J.

But the whole act nowhere condemns or prohibits combinations, partnerships, corporations or trusts from carrying on interstate trade, but recognizes that lawful combinations, lawful corporations and lawful trusts may engage in interstate trade. The act does prevent all of these from making contracts or agreements in restraint of that interstate trade, or from creating, by unlawful means, a monopoly in it; but so long as the combination or the corporation or the trust does not use unlawful means, it may enter the field of competition for the interstate trade and secure what it can.

The size of the corporation or the combination is not regulated by the Sherman Act. This, like the wealth of the individual who desires to engage in interstate trade, is unimportant. The man worth millions may engage and the man

worth hundreds may so engage, and each has exactly the rights of the other. Each may use all the advantages he has to advance him in the competition. He may use his great wealth, his friendships, his astuteness, his knowledge, his foresight and his skill, and may use each of these to its full tensile strength. These advantages which the wealthy man has over the poor the law allows; and when the poor man owning hundreds gets to be worth millions, he, in his turn, may use these millions. Competition must be free, but the law does not guarantee that all who enter into the strife are equally fit for it or equally favored for it, or have equal means of succeeding in the strife.

The law gives open opportunity to all, but the law does not guarantee that each one of the all who enters any trade or business, or profession, or occupation, in life, is equipped, mentally or morally or physically or financially, for the strife equal with any other.

Whether Congress might limit the extent to which the individual might strive for interstate trade or the extent of the wealth which he might invest in it may be doubtful as an undue restriction of the individual's liberty and the right of the individual to use his property granted to him by the Federal Constitution. Whether Congress might restrict the size of the corporation as to its wealth or capital stock or the size of the combination or the size of the trust is uncertain, but assume, for argument's sake, that Congress might, it is certain that Congress never has, and if such a power exists in the United States under our form of Government it must be legislative in its nature, and for Congress and not for the courts to declare. The courts are organized to settle disputes and controversies, and not to enact economic laws governing trade. They construe laws, but do not enact them.

Commissioner Smith, of the Bureau of Corporations, says in his report:

> "Corporate combination, as such, appears to be not only an economic necessity, but also largely an accomplished fact. * * * It is not the existence of industrial power, but rather its misuse, that is the real problem. * * * Corporate methods, not corporate existence, is the question at issue. The Government should direct its attention toward preventing such unfair methods, and toward keeping open the opportunities for competition in industry."

This idea is very clearly expressed by Judge Jackson *In Re Greene,* 52 Fed., 104, 115:

> "It is very certain that *Congress could not,* and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the *accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein,* or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises, involving the purchase, sale or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged and developed. But *the magnitude of a party's business,* production or manufacture, with the incidental and indirect powers

thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production or manufacture, *is not the monopoly* or attempt to *monopolize,* which the statute condemns."

I Eddy on Combinations, Sec. 177:

"The *magnitude of the combination* has a direct bearing upon the power, but not upon the character of the combination. The legality of a combination is not determined by the extent of its power or influence. Its legality is determined by the purposes to which the combination proposes to devote its power and influence; and since neither the morality nor the legality of a purpose is measured by its magnitude, a small combination may be as illegal, though not as dangerous, as a large one."

Northern Securities Co. vs. United States, 193 U. S., 197, 407, Holmes, J.:

"Suppose that, before either road was built, Minnesota, as part of a system of transportation between the states, had created a railroad company authorized singly to build all the lines in the states now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the present charter does. It would have been *a large one,* but the *act of Congress makes no discrimination according to size. Size has nothing to do with the matter.* A monopoly of 'any part' of commerce among the states is unlawful. The supposed company would have owned lines that

might have been competing—probably the present one does. But the act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end."

United States Chemical Co. vs. Provident Chemical Co., 64 Fed., 946, 950:

"Our attention has been called to many cases which condemn, in perhaps not too severe terms, combinations and trusts. It is a nervous and alarmed imagination which sees in every transaction involving *large exchange of properties* a monster threatening public interests. Combinations in the nature of modern trusts, so soundly condemned, are those which aim at a union of energy, capital and interest to *stifle competition,* and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of exchange of one valuable right or thing for another."

Dueber Watch-Case Manufacturing Co. vs. Howard Watch & Clock Co., 66 Fed., 637, 643:

"It may be assumed that the total amount of any given commodity which will be purchased by a community is limited, and when several sellers of such commodity enter into a combination in the form of a partnership, and by ingenious advertising, or by the devices of business competition, or by the offer of favorable terms to buyers, *enlarge their own trade in such commodity,* they restrain to some extent the trade of one or more of their competitors therein. But no one, not even the plaintiff in error, contends that the statute forbids any such acts, although, if the words be taken

with absolute literalness, the phrase 'restraint of trade' is broad enough to cover them."

In *Re Corning,* 51 Fed., 205, 211:

"From these debates it is evident that the *Congress did not intend to limit the amount of capital a citizen should invest in any line of business,* or restrain his energy or enterprise on acquiring for himself all the trade possible in such business, provided in doing so he did not, by illegal contracts or devices, restrain others from pursuing the same business, or deprive the public from enjoying the advantages of the free use of capital, skill and experience of competitors."

In *United States vs. American Tobacco Co.,* 164 Federal, 700, 709, Judge Coxe said:

"It has never been held that the mere fact that a business is large and is extended over a wide territory renders its promoters amenable to the statute. Success is not a crime. * * *

"* * * It is true that the Cigar Stores Company has been energetically and, perhaps, aggressively managed; it is true that a part of the business thus built up would have been done by others had the company not been formed; but this is true of every large and successful business. Prosperity is the premium which has always been awarded to earnest and intelligent endeavor. The statute was never intended to punish success or reward incompetency."

In *Mogul Steamship Co. vs. McGregor,* L. R. 23 Q. B., 598, Lord Justice Bowen said (page 618):

"It is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for

which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of *attempting to set boundaries to the tides.*"

Coquard vs. National Linseed Oil Co., 171 Ill., 480, 484:

"About the only fact, however, averred in the bill which might constitute a part of the facts necessary to show a trust is, that the defendant has acquired a *great many oil mills and plants* and is *managing a large business.* The facts pleaded are insufficient to show the existence of a trust."

Test in This Case.

The result then is that the test in this case must be this, and only this:

Were the defendants when this bill was filed using *unlawful* means in their competition for the interstate trade in oil and its products? Incidentally we may discuss the question whether the present size of the combination is the result of lawful or unlawful means. It is, however, still true that the sole question in *this* case is *not* how the Standard Oil Company grew and not how it became so great and not whether it may or may not have committed wrongs before the Sherman Act was passed, but the sole and only question is: Was that company, with its associates, violating the Sherman Act when this petition was filed? Was it then doing unlawful things forbidden by the act?

The point of time then, then; not before that time, but THEN.

ANALYSIS OF THE SHERMAN ACT.

The Sherman act in its first section is directed to the contract, the combination, the conspiracy in restraint of trade or commerce among the several states. It is every contract, every combination, whatever may be its form, and every conspiracy in restraint of commerce. It will hardly be denied that the contract then is the basis of the thing which section one of this act is directed against. The combination necessarily implies a contract or agreement among those who form it, and the very basis of the conspiracy is the breathing or agreeing together to do a certain thing. It would seem then to be reasonably clear that what Congress meant by this section was to strike at contracts either made directly and formally, as in writing, and called a contract, and made by but two or several, or the larger form of a contract where twelve or more agree with each other to do a certain thing, and called a combination or conspiracy. The combination under section one is evidently the same as the conspiracy, because, if the combination, whatever be its form, is in restraint of trade, and only such combinations are prohibited, then the act declares it to be illegal, and therefore the combination itself is a conspiracy.

One person could not make a contract—or form a combination—or conspiracy. It at least would require two or more.

This is emphasized by the further words in section one,

"in the form of trust or otherwise."

It does not say in the form of a corporation, but of

"a trust."

This was the combination where many joined in restraint of interstate trade. But one person could not form

a trust; a number may, and the trust may consist of individuals and corporations. But a single corporation cannot make a trust in its popular meaning any more than a single person. Under section 8 the word *"person"* does include a corporation, but only as it includes an individual.

It seems clear, then, that the corporation is not hinted at, much less prohibited by Section one. That it is a corporation, big or little, does not make it a *trust,* and Congress did not say so or mean to say so by the language used.

So far we emphasize the fact that not only does not the Sherman Act prohibit corporations or trusts or combinations, but it really authorizes their existence and participation in trade.

In the *United States vs. Joint Traffic Association,* 171 U. S., 567, Mr. Justice Peckham said (567):

> "* * * we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership."

In *Smiley vs. Kansas,* 196 U. S., 447, 457, Mr. Justice Brewer said (456-457):

> "But a secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, *without any merging of interests through partnership or incorporation,* is one to which the police power extends."

National Cotton Oil Company vs. Texas, 197 U. S., 115, 128, McKenna, J.:

"There are some things which counsel easily demonstrate. They easily demonstrate that *some combinations* of capital, skill or acts *is necessary* to any business development, and that *the result must inevitably be a cessation of competition.*"

Chesapeake & Ohio Fuel Company vs. United States, 115 Fed., 610, 620. Day, Circuit Judge:

"Looking then to the contract in question, we find fourteen of the coal producers of this district, whose aggregate production is 5,000 tons a day, entering into an agreement which, *without making a partnership,* undertakes to control the entire output of the several mines."

Northern Securities Co. vs. United States, 193 U. S., 197, 410, Holmes:

"*A partnership is not a contract or combination in restraint of trade* between the partners unless the well known words are to be given a new meaning invented for the purposes of this act."

Assuming now that the Congress used the word "illegal" in this section as equivalent to "unlawful," which is the most favorable interpretation for the Government, we find that this section 1 of the Sherman Act declares to be unlawful a contract, a combination, or a conspiracy when it is in restraint of trade or commerce among the several states.

Congress has several times in this act used the word "restraint" or "restrain;" thus you find it in section 1, "in restraint of trade;" you find it again in section 3, "in restraint of trade," and twice used there. Then you find the word again used in section 4, "to restrain the violations of this act."

Webster defines the word *restraint*: "The act or power of retaining or holding back or hindering from motion or action in any manner."

According to a well known rule of construction the word "restraint" then wherever used receives the same interpretation whether in the expression "in restraint of trade" or the expression "to restrain the violations of this act."

Potter's Dwarris on Statutes, page 193:

> "If the same words occur in different parts of a statute or will, they must be taken to have been *everywhere used in the same sense.*"

Wheaton vs. Peters, 8 Peters, 591, 661:

> "There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained as by comparing it with the words and sentences with which it stands connected."

Turning to this first section where Congress first used the word, let us look at its context to see if there can be any doubt as to its meaning.

"In restraint of trade"

seems plain enough; it is to pull back, to hinder or pre-

vent trade. This seems also to be its plain meaning in the other paragraphs. The context of the first paragraph does not seem to vary in its meaning or throw any additional light on it, and you then come back and gather up your words, and you find that Section 1 declares to be unlawful contracts, combinations, conspiracies which actually do restrain interstate trade.

In *Hopkins vs. United States,* 171 U. S., 592, the Court said:

> "The contract condemned by the statute is one whose *direct* and *immediate* effect is a restraint upon that kind of trade or commerce which is interstate. * * * There must be some direct and immediate effect upon interstate commerce in order to come within the act."
>
> See many cases cited on pages 594-598.

In the *Joint Traffic Case,* 171 U. S., 568, the Court said that the Sherman act

> "applies only to those contracts whose *direct* and *immediate* effect is a restraint upon interstate commerce."

Section one prohibits contracts which as a fact restrain interstate trade.

To combine or to conspire in restraint of interstate trade necessarily implies a contract or agreement so to do. There must be the breathing together, that is, the agreeing together to do a certain thing, and such agreement is a contract to do it; so that this first paragraph relates to contracts, and really

only contracts in restraint of trade. This contractual relation seems to be further shown by the expression

> "Every person who shall *make* any such contract or *engage in* any such combination or conspiracy shall be deemed guilty," etc.

The word "make" and the words "engage in" signifying the same thing, the agreeing to do that which amounts to a restraint of trade.

Here the direct and formal making by two or more of a formal contract is specifically mentioned, and then the expression,

"engage in any such combination or conspiracy," follows. If I engage in a conspiracy or a combination, or I make an engagement of any kind, I enter into a contractual relation; an engagement to marry or an engagement of employment. This adds to what seems plain on the face of it, that it is the agreement in restraint of trade by two or many that is prohibited by section one. As Mr. Justice Sanborn, in this case in his opinion on the order to serve outside defendants, said, if one

> "operates with others knowing them to have the same design, *there is in fact an agreement between him and them.*"

It will not be overlooked that Congress did not prohibit combinations in trade; it, in fact, recognized their use and legality when it only made illegal those in restraint of trade.

Plainly it had before it combinations which are formed for interstate trade, and concluded that *only such* of them as were by contract restraining interstate trade are hurtful, and it therefore made only such illegal.

It thereby affirmed that combinations which do not restrain interstate trade are legal—not in violation of the law or the Sherman Act.

But, as we have seen, even more is apparent. The trust itself is not made illegal or prohibited. Only such *trusts* as by contract restrain trade. Therefore a trust even composed of corporations is not illegal unless it actually, by agreement, restrains interstate trade.

Then, too, section one only is directed against the actual restraint of trade, not the mere *attempt* to restrain. Section two makes the *attempt* to monopolize a crime, but section one does not. It is only the actual restraint it aims at, at least where private traders *only* are involved.

The language is "in restraint of trade or commerce." It is not *"to restrain,"* but *"in restraint."* That is, the contractor, combination or conspiracy actually *does restrain.* As stated, this is emphasized by the second section which makes the mere "attempt" to monopolize a crime. Now a contract may itself restrain trade, as where A and B agree that A will not refine oil. But an agreement between A and B that C shall not refine oil does not restrain C. A and B, rivals of C, all being refiners, may contract for the legitimate enlargement of their own trade to compete with C by cutting prices, etc. All lawful means to compete with C they may use, but they may not use unlawful means.

Section one is inoperative unless there is actual restraint.

Congress has the regulation of the intangible thing called commerce, and that gives it the regulation of the means by which commerce is carried on. The transporter from one state to another does not gain title to the object

transported by or through any Federal law. That title is given to him by the state, not by the Federal Government. It is only when the article itself is in actual transmission from one state to another that it is subjected to the jurisdiction and control of Congress. Under the Sherman Act, then, Congress can only forbid the acts which restrain in its transit from state to state and in the negotiations and bargains which lead up to it the article dealt in. Just as soon as the restraint is removed the object of the act is accomplished, and trade is left unrestrained. It is the *restraint* only and not the object itself dealt in that section one of the act prohibits.

Remove restraint and trade is free. The very purpose of the act is to protect trade and make it free; not to forbid the trade itself.

Section 6 forfeiting property used as a part of and in connection with the success of the combination is a mere penalty just as the imprisonment and fine is. It seems to have no other significance and certainly does not enlarge the jurisdiction of the court.

It certainly does not prove an intent of Congress to inquire into or regulate the ownership of the property which enters into interstate trade.

Distinction Between First and Second Sections of Sherman Act.

Section three, which extends the prohibition of the act to the territories, copies the language of section one verbatim, but not that of section two, as if section one contained the substance and was the primary definition of the offense, and section two was only another description of the same evil, emphasizing the monopoly feature, resulting from successful combination.

In addition, a monopoly or an *attempt* to monopolize *by a single person* or corporation, is forbidden by section two, whereas a combination or contract in restraint of trade requires at least two parties. This difference was pointed out by Mr. Justice Holmes in his dissenting opinion in the *Northern Securities case* (193 U. S., at page 404), in which he compared the first and second sections as follows:

> "All that is added to the first section by section 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the states; and that the liability is extended to attempting to monopolize anv part of such trade or commerce. It is more important as an aid to the construction of section 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man."

United States vs. Patterson, 55 Federal, 605, 640, Judge Putnam:

> "I think it is useful to analyze the statute. Separating it into parts we have: First, contract in restraint of trade; second, combination in restraint of trade, and third, conspiracy in restrain of trade. There can be no question that the second and third parts, as thus put, receive color from the first. Morover, it is important to note the rule that this whole statute must be taken together. The second section is limited by its terms to monopolies, and evidently has as its basis the engrossing or controlling of the market. The first section is undoubtedly in *pari materia,* and so has as its basis the engrossing or controlling of the market, or of lines of trade. The sixth section also leads in the same direction, because it provides for the forfeiture of prop-

erty acquired pursuant to the conspiracy. Undoubtedly the word 'conspiracy' in that section has reference to the same subject-matter as in the first."

Whitwell vs. Continental Tobacco Co., 125 Federal 454, 462, Judge Sanborn said:

"The *purpose of the second section is the same as that of the first*—to prevent the restriction of competition—and *the two sections ought to receive similar interpretations.* The Supreme Court has declared that the true construction of the first section is that no contract, combination or conspiracy is denounced by it unless its necessary effect is *to directly and substantially restrict* competition in commerce among the states. By a parity of reasoning the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states."

United States vs. American Tobacco Co., 164 Federal, 700, 727, Judge Ward:

"*The first and second sections must be read together, and I think mean the same thing,* the second adding nothing except to extend the prohibition to individuals who, without combination, monopolize or attempt to monopolize. It must be under stood to prohibit monopolies or attempts to monopolize brought about by the unlawful means contemplated in the first section, viz., the purpose to restrain trade by preventing competition and preventing others from participating in it. The third section of the act bears out this

construction, because it does not mention monopolies or attempts to monopolize in the territories or District of Columbia, where the jurisdiction of the United States is supreme in all things, and it can hardly be that Congress intended to declare innocent acts committed within them which it pronounces crimes if committed in the states."

Section Two of the Sherman Act.

The second section of the Sherman Act is primarily directed to the individual, while the first is primarily directed to combinations, contracts and conspiracies. To show a violation of section 2 the Government must prove an attempt to gain the exclusive control of some part of interstate trade, either say of one or more of the objects of trade or the modes of transportation of the objects or the bargain and sale of such objects, and an attempt to do this by unlawful means. While the actual ownership of a control need not be shown, yet the proof must show: (Mr. Justice Holmes, *Beef Trust,* 196 U. S., 375, 396)

(a) An intent;

(b) A tendency;

(c) An imminent probability of the creation of a monopoly.

So long as the attempt is made by lawful means which leaves open competition there is no violation of section two, even if the attempt to gain control of a large portion of the interstate traffic is successful.

As section one is directed against the contracts which, being executed, restrain trade, and is *not* primarily directed

against the individual (and indeed the individual alone could not violate it), section two *is* primarily directed against the individual. It begins:

> "Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize."

It is the person, then, who may monopolize; any one individual might, this section contemplates, monopolize the interstate trade, or at least if he did not monopolize he could attempt to, and the individual who does so is deemed guilty of a misdemeanor. It is the individual who is punished and not the combine or conspirators, because this section of the act says:

> "Every *person* who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize * * * shall be deemed guilty of a misdemeanor."

The person may act singly or he may combine or he may conspire with others, but it is the *individual* who does these things that the act is directed primarily against, and it is not the combine or conspiracy. It is probably true that each one of the combine that attempts to monopolize is equally guilty with him who originated the combination, and this is equally true of the conspiracy, and it is not doubted that each and all of the persons who joined the combine or conspiracy for the purpose of and in an attempt to monopolize the interstate trade are deemed to be guilty of a misdemeanor.

THE PURPOSE OF THE SHERMAN ACT IS TO FURTHER FREE COMPETITION IN INTERSTATE TRADE.

The only qualification is *free* competition, not reasonable competition or fair competition, but simply and only *free* competition; that is, all the means of competition that are lawful.

In the *Northern Securities case,* 193 U. S., 331, the Supreme Court of the United States said that Congress, by the Anti-Trust act,

> "Has prescribed the rule of free competition among those engaged in such commerce."

That combinations whose tendency is

> "To deprive the public of the advantages that follow from free competition"

are forbidden by the Sherman act.

On page 337 the Court said that the Sherman Act prescribed that interstate trade should not be vexed by combinations

> "which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule because in all the prior *cases* in this Court the Anti-Trust Act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts *free competition* among those engaged in interstate commerce. In other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce."

In the *Joint Traffic Association case,* 171 U. S., 569, the Supreme Court of the United States said that the contract in that case

> "affects interstate commerce by *destroying competition;*"

and then on the same page said:

> "Has not Congress with regard to interstate commerce and in the course of regulating it in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition?"

Again, on page 570, the Court said:

> "* * * we think Congress is competent to forbid any agreement or combination among them by means of which *competition* is to be smothered."

Again on the same page the Court said that Congress could prohibit contracts,

> "*which would* extinguish all competition."

The Court said (p. 571) that the evil of the agreement in that case was the

> "stifling competition."

The Court said (p. 575) that Counsel had insisted that the stifling of competition did not necessarily restrain commerce, to which the Court replied (577):

> "The natural, direct and immediate effect of competition is, however, to lower rates and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent this play of competition restrains instead of promoting trade and commerce."

Again, on the same page, the Court said:

> "An agreement of the nature of this one which directly and effectually stifles competition must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition. * * *"

In the *Addyston Pipe case,* 175 U. S., 211, the vice of the agreement was that (p. 245):

> "It eliminates the competition."

In *Swift & Company vs. U. S.,* 196 U. S., 375, the Court stated that the purpose of the combination was

> "to monopolize the commerce and prevent competition."

In *United States vs. Freight Association,* 166 U. S., 337, the Court said:

> "Competition *free* and *unrestricted* is the general rule which governs all the ordinary business pursuits and transactions of life. Evils as well as benefits result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and disaster, yet balancing the benefits as against the evils the law of competition remains as a controlling element in the business world."

United States vs. E. C. Knight Co., 156 U. S., 16, Fuller.

United States vs. Freight Association, 166 U. S., 337:

> "*Competition, free* and *unrestricted,* is the general rule which governs all the ordinary business pursuits."

Hopkins vs. United States, 171 U. S., 587.
Anderson vs. United States, 171 U. S., 617.
Bement vs. National Harrow Co., 186 U. S., 94.

The agreement was held valid because it

"had no purpose to stifle competition."

Montague & Co. vs. Lowry, 193 U. S., 46.
Swift & Co. vs. United States, 196 U. S., 659.
Harriman vs. United States, 197 U. S., 291.

Chattanooga Foundry vs. Atlanta, 203 U. S., 396, Holmes, J.:

"One object of the combination was to prevent other producers * * * from *competing.*"

Shawnee Compress Co. vs. Anderson, 209 U. S., 435, McKenna, J., approved the state court's statement holding the lease illegal, because

"*competition* within that district is *annihilated.*"

Waters-Pierce Oil Co. vs. Texas, 212 U. S., 110, Day, J.: The Sherman Act condemns any combination which tends

"to deprive the public of the advantages that flow from *free competition.*"

Continental Wall Paper vs. Voight & Sons Co., 212 U. S., 256.

THE GOVERNMENT TO PROVE ITS CASE MUST SHOW VIOLATIONS OF THE FEDERAL LAW. THERE WAS NO FEDERAL LAW APPLICABLE PRIOR TO THE SHERMAN ACT.

The inquiry here is solely this: Was the Sherman Act being violated by the defendants when the petition in this case was filed?

This is a question of Federal law and between the United States and citizens of the United States. It is not a controversy between a State and its citizens, and the Government cannot make out its case by appealing to State laws or showing any violation thereof. The individuals are:

1. Citizens of the United States;
2. Citizens of the State.

Each sovereign has its own distinct, exclusive field of jurisdiction. The State cannot provide for the Federal rights of a citizen of the United States or punish the violation thereof, and equally the United States cannot protect the State rights of the citizen or punish the violation thereof.

United States vs. Reese, 92 U. S., 214;
United States vs. Harris, 106 U. S., 629;
United States vs. Cruikshank, 92 U. S., 542;
United States vs. Fox, 94 U. S., 315;
Logan vs. U. S., 144 U. S., 263.

The rights and duties of the defendants and the lawfulness or otherwise of their conduct, as alleged in the petition, are to be tested by Federal laws only, and if the things alleged in the petition as done by the defendants prior to 1890 were not forbidden by those Federal laws, the same must be regarded up to 1890 as innocuous. Whatever doubts there may be under the decisions (cases cited *infra*)

as to the existence or not of any so-called Federal common law, it seems certain that such Federal common law could only involve acts which came under Federal control by reason of the grants in the Federal Constitution to the United States Government. Article 10 of the Federal Constitution reserved it to the States. For the Federal Courts to create by decisions a Federal common law outside of and foreign to the powers granted to the Federal Government would necessarily invade the rights of the States and exceed the granted jurisdiction.

The Federal Courts have just the judicial power given and authorized by Article 3 of the Constitution, and such is limited to the scope of the powers granted in the Constitution to the Federal Government, except in certain specific instances like litigation between citizens of different States, etc.

For the judicial power to assume and use the power to legislate and create and enforce a Federal common law on subjects foreign to the powers granted to the Federal Government would be wholly unjustified.

Especially is this the case in the regulation of interstate commerce. The power is to regulate, and it is given not to the Courts, but to Congress. What those regulations shall be is a legislative question only. It is not judicial. The Courts are powerless to establish regulations. True the Federal Courts have held that in the absence of regulations by Congress it was a Congressional declaration that interstate commerce should be free, and therefore the acts by States or individuals which directly, immediately and substantially do regulate or interfere with interstate commerce are unauthorized excursions into the field of Congressional powers.

But Courts have always and still do say that there is no Federal crime unless so declared by Act of Congress.

Manchester vs. U. S., 139 U. S., 262;
North Shore Co. vs. Nicomen Co., 212 U. S., 412.

The Supreme Court ruled in *Wheaton vs. Peters,* 8 Peters, 591:

"It is clear there can be no common law of the United States."

The Federal Courts have no jurisdiction except that which is conferred by the Constitution or Acts of Congress, and cannot recognize any crime against the United States except that which has been so declared by Acts of Congress.

Cooley's Const. Lim. pp. 47-48, and notes;
U. S. vs. Hudson, 7 Cranch, 32;
U. S. vs. Coolidge, 1 Wheaton, 415;
U. S. vs. Britton, 108 U. S., 199-206.

Wheaton & Donaldson vs. Peters & Grigg, 8 Peters, 591, 658. Mr. Justice McLean said:

"It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption. When, therefore, a common law right is asserted we must look to the State in which the controversy originated."

Holmes vs. Jennison, 14 Pet., 540, 620; Baldwin, J.

In *Smith vs. Alabama,* 124 U. S., 464, 477, 479. A statute of Alabama requiring locomotive engineers to obtain a license from the State authorities was held not void as a regulation of interstate commerce.

Mr. Justice Mathews said:

"But for the provisions on the subject found in the local law of each State there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto,* to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress, or presumed to be adopted by it, *there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals.* In other words, if the law of the particular States does not govern that relation, and prescribe the rights and duties which it implies, *then there is and can be no law that does until Congress expressly supplies it,* or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce."

* * * * * * * *

"*Wheaton vs. Peters,* 8 Pet., 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the Courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated in the case of *Railroad Co. vs. Lockwood,* 17 Wall,

357, where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State."

In *United States vs. Hudson,* 7 Cranch, 32, the Court held that the Federal Courts have no common law jurisdiction in criminal cases, and sustained a demurrer to an indictment for libel on the President and Congress.

United States vs. Britton, 108 U. S., 199, 206:

"*There are no common law offenses against the United States*: *United States vs. Hudson,* 7 Cranch, 32; *United States vs. Coolidge,* 1 Wheat, 415."

Manchester vs. United States, 139 U. S., 240, 262:

"The Courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the Courts of the United States is wholly derived from the statutes of the United States: *Butler vs. Boston & Savannah Steamship Co.,* 130 U. S., 527; *The Belfast,* 7 Wall, 624; *The Eagle,* 8 Wall., 15; *Leon vs. Galceran,* 11 Wall., 185; *Steamboat Co. vs. Chase,* 16 Wall., 522; S. C. 9 R. I., 419; *Schoonmaker vs. Gilmore,* 102 U. S., 118; *Insurance Co. vs. Dunham,* 11 Wall., 1; *Jones vs. United States,* 137 U. S., 202, 211."

United States vs. Eaton, 144 U. S., 677, 687:

"It is well settled that there are no common law offenses against the United States: *United States vs.*

Hudson, 7 Cranch, 32; *United States vs. Coolidge,* 1 Wheat., 415; *United States vs. Britton,* 108 U. S., 199, 206; *Manchester vs. Massachusetts,* 139 U. S., 240, 262, 263, and cases there cited."

Pettibone vs. United States, 148 U. S., 197, 203. Chief Justice Fuller:

"The Courts of the United States have *no jurisdiction* over offenses not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated."

Cooley's Const. Lim., page 47:

"And although the Courts of the United States administer the common law in many cases they *can recognize as offenses against the nation ONLY* those acts which are made criminal and their punishment provided for by acts of Congress."

In *Williamette Iron Bridge Co. vs. Hatch,* 125 U. S., 1, 8, Mr. Justice Bradley said:

"The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. *But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers,* unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced (a point which we do not undertake

to decide) it would not avail to sustain the bill in equity filed in the original case. *There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the Courts of law and equity, obstructions and nuisances in navigable streams within the States.* Such obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offences against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different States, the Circuit Courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this Court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Willson vs. Black Bird Creek Co.,* 2 Pet., 245; *Pollard's Lessee vs. Hagan,* 3 How., 212, 229; *Passaic Bridges,* 3 Wall., 782 App.; *Gilman vs. Philadelphia,* 3 Wall., 713, 724; *Pound vs. Turck,* 95 U. S., 459; *Escanaba Co. vs. Chicago,* 107 U. S., 678; *Cardwell vs. American Bridge Company,* 113 U. S., 205; *Hamilton vs. Vicksburg, etc., Railroad Co.,* 119 U. S., 280; *Huse vs. Glover,* 119 U. S., 543; *Sands vs. Manistee River Imp. Co.,* 123 U. S., 288; *Transportation Co. vs. Parkersburg,* 107 U. S., 691, 700. The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the State law relied on, is a State question, not a Federal one. The failure of State functionaries to prosecute for breaches of the State law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence."

This case is cited and approved in 1909 in the case of *North Shore Boom Co. vs. Nicomen Boom Co.,* 212 U. S. 412.

Counsel for the Government on the oral argument cited, in favor of the proposition that there was a Federal common law in 1882 which bore upon the questions in controversy, the *Telegraph Case,* 181 U. S. 102, the *Debbs Case,* 158 U. S. 564, and the *Steamship Company Case,* 122 U. S. 326; but he said in connection therewith that

> *"That law * * * did not necessarily confer a cause of action in favor of an individual; certainly not a cause of action on behalf of the Government to enjoin it."* (p. 100, Stenographic Report).

It is submitted that:—

(a) The Petition filed in this case relies solely and only on the Sherman Act and not on the existence of any Federal common law prior to its passage:

(b) The Petition charges a crime and a crime against the United States. There is no such thing as a crime against the United States unless it be so declared by Act of Congress. The Government must make out its case proving the crime under Federal law only. There was no Federal law making, say the Agreement of 1882 or 1879, a crime against the United States Government. The ruling in the *Western Union Telegraph Case,* which was a controversy between citizens of different States and involved only their relative rights, is not important here:

(c) As the Counsel for the Government admit that this Court would have had no jurisdiction in 1882 to enjoin the Trust Agreement of 1882, even if it were contrary to the Sherman Act now, it is difficult to see what kind of a Federal common law could have been in existence then. A law that could not be enforced would be an anomaly.

See also *Newport & Cincinnati Bridge Co., vs. United States,* 105 U. S., 470, 475.

Pennsylvania vs. Wheeling & Belmont Bridge Co., 13 How., 518, 581; McLean, J.

Transportation Co. vs. Parkersburg, 107 U. S., 691, 701.

EVEN IF REFINERIES HAD BEEN ACQUIRED BY MEANS UNLAWFUL PRIOR TO THE SHERMAN ACT (WHICH WE DENY), YET THIS CANNOT INFLUENCE THE DECISION IN THIS CASE.

The Government alleges that between 1870 and 1882, the defendants, by improper means, acquired certain refineries.

It might be sufficient to say that the acquisition of those refineries raised questions between the owners of the refineries and the defendants, and the owners of the refineries themselves are not here complaining:

But there are additional reasons:

(a) The Federal Courts are not concerned with the methods of the acquisition of title. This belongs solely to the State:

(b) The acquisition of title by the means used was not prohibited by any Federal statute or any alleged Federal common law:

(c) The only thing which these defendants put into interstate trade and for which they compete is the trade in oil and its products. The refineries are not in interstate trade. It is the oil only and its products. The oil itself was not illegally acquired, and the Government does not so allege. How is it possible to inflict the vice, if any there be, of the acquisition of the title of the real estate to the refined oil and its products?

Dent vs. Ferguson, 132 U. S., 50, 66.

Brooks vs. Martin, 2 Wall., 70, 80.

Plaintiffs and defendant formed a partnership to buy up soldiers claims for public lands. After they had obtained lands in this manner and sold them, taking notes and mortgages in payment of same, plaintiff filed a bill in equity to compel the defendant to account for the proceeds. The bill was sustained, Mr. Justice Miller saying:

> "* * * The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

In *Armstrong vs. Toler,* 11 Wheat., 258, a case is put of goods smuggled into the country; here even if the vendor knows them to be smuggled he may buy them.

> "The consideration is not infected with the vice of the importation. * * * This would be to connect distinct and independent transactions with each other,

and to infuse into one which was perfectly fair and legal in itself, the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life not compensated by any one accompanying advantage. * * *"

State vs. Continental Tobacco Co., 177 Missouri, 34.

In *Planters Bank vs. Union Bank,* 16 Wall., 483, 499, Mr. Justice Strong said:

"Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. *It is enough that the defendants have in hand a thing of value that belongs to them.* Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the

parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

Railroad Company vs. Durant, 95 U. S., 576, Swayne, J.:

"But it is said the conveyances grew out of an illegal transaction between the company and the grantors. To this there are several answers. The grantors have voluntarily executed the contract. They have not intervened and do not complain."

THE SUPREME COURT OF THE UNITED STATES HAS ALREADY RULED IN REFERENCE TO THE SHERMAN ACT, AMONG OTHER THINGS, AS FOLLOWS:

(a) "There can be no question of any act being recorded as a violation of the statute which occurred *before it was passed.*" (166 U. S. 342).

(b) If an object carried in violation of Section 6 should be forfeited, the carrier could not be punished under the Sherman Act for so carrying, even if he knew the thing carried was forbidden by the Act (166 U. S., 314).

(c) On pages 318, 321, 166 U. S., the Court considered the difference between a private and a public corporation and says that the private corporation has a private business that it can cease when it pleases. It may charge whatever prices it pleases for the same article to different persons and in different places. It may charge as

much as it can get for the article in which it deals, even though the price may be unreasonable. It may make such discriminations in its business as it chooses and may refuse to do business with one person and do business with another; while the railroad corporation must transport all persons and property that come to it; must so transport for the same price for the same service, and the price must be reasonable, and it cannot, at its will, stop its business.

On page 325 the Court said:

> "It is entirely appropriate generally to subject corporations or persons engaged in trading and manufacturing to *different rules* from those applicable to railroads in their transportation business."

(d) There may be some contracts in restraint of trade under the Sherman Act that are lawful, and the Court said (p. 328) that the tendency of the law is to grant to the vendors of an object

> "the freest opportunity to obtain the largest consideration for the sale of that which is his own,"

and that a contract restricting the vendor from dealing for the future in the articles sold

> "might not be included within the letter or spirit of the statute in question."

(e) On page 323 the inevitable effect of changes in the manner of doing business, and also the injurious effects of competition are given at length.

(f) Railroad corporations are of such a public nature that they are not allowed to make any contracts in restraint of trade (see pages 331, 336 to 338).

(g) On pages 336, 337, the evil effects from competition are given.

(h) In the *Northern Securities case* (p. 435, Vol. 193) the Attorney-General in his brief said:

> "The Government does not claim that ordinary corporations and partnerships, formed in good faith in ordinary course of business, come within the prohibition of the Act because incidentally they may, to some extent, restrict competition, but that when the corporation or partnership is formed for the purpose of crushing competing business,"

then it is within the Act.

In the *Tobacco cases* Judge Coxe said:

> "The statute was not intended to strike down enterprises or to prevent the restraint of trade by destroying it. Many large merchants find it profitable to conduct their business through a chain of stores, and it has never been held that the mere fact that a business is large and is extended over a wide territory renders its promoters amenable to the statute. Success is not a crime."

In *Hopkins vs. U. S.,* 171 U. S., 591, the Court said that the Sherman Act only condemns contracts whose

> "direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate."

Again on the same page the Court said that the Sherman Act does not include contracts which either enhance the cost in interstate traffic or reduce it, but only contracts which directly and substantially have (p. 592)

> "some direct and immediate effect upon interstate commerce."

On page 600 the Court said:

> "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it. We have no idea that the Act covers or was intended to cover such kinds of agreement."

In the *Addyston Pipe case,* 175 U. S., 229, the Court said that the commerce clause of the Constitution does limit the liberty of contracts and enables Congress to prohibit such as

> "private contracts which directly and substantially and not merely indirectly remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States."

Again, on page 239 in the same case, the Court said:

> "That the fact that an article is manufactured to export to another State does not make it a part of interstate commerce,"

and it is said that in the *Knight case* the principle was laid down

> "that a combination simply to control manufacture was not a violation of the Act of Congress because such a contract or combination did not directly control or affect interstate commerce."

In the *Northern Securities case,* 193 U. S., 337, Mr. Justice Harlan said:

> "To destroy or restrict free competition in interstate commerce was to restrain such commerce."

In the *National Oil Company vs. Texas,* 197 U. S., 129, the Court said:

> "According to them, competition, not combination, should be the law of trade. If there is evil in this, it should be accepted as less than that which may result from the unification of interest and the power such unification gives."

THE PRESENT CASE IS UNIQUE AND DIFFERENT FROM EVERY OTHER CASE DECIDED UNDER THE SHERMAN ACT, AND IS NOT OBNOXIOUS TO NOR RULED BY ANY OF THE DECIDED CASES.

The cases decided by the Supreme Court of the United States may be put into groups:

> 1. Cases where the different railroad companies charged with the duty of carrying interstate traffic for all alike, and competing for that traffic, by formal contracts agreed not to compete, not to fix competitive rates, but to appoint a committee or some agent to settle a common price for all. This was held to be a violation of the Sherman Act, because it restricted or stifled competition.

Such cases are the *Trans-Missouri case,* 166 U. S., 290, and the *Joint Traffic Association case,* 171 U. S., 505.

Really the *Northern Securities Case,* 193 U. S. 197, falls under this class, for, as the Supreme Court of the United States decided, it was held to be an agreement between the stockholders of two competitive railroads to suppress competition between them by pactically consolidating the two railroads, and hence was void under the Sherman Act because it stifled competition.

2. Cases where different individuals and corporations engaged in interstate commerce, and competing theretofore entered into a combination whereby they agreed that they would not compete with each other; that they would not fix competitive prices, but, by various devices differing somewhat in the different cases, a uniform price was to be established which would govern all the members of the combination. But in each case the marked features were:

(a) The competing traders agreed by formal contract to no longer compete:

(b) They agreed that the prices for all the competitors should thereafter be fixed without competition and by a selected body:

(c) They provided divers means by which others were prevented from competing for the trade:

(d) Devious and, in most cases, unlawful devices were used and approved by the combination; and,

(e) In each case the agreement was made or actively continued after the Sherman Act was passed.

(f) In no one of these cases did independent competitors merge into a partnership or corporation.

Such cases are:

The Addyston Pipe Case, 175 U. S. 211 (Pipe);
Swift & Company vs. U. S. 196 U. S. 376 (Beef);
The Cincinnati Co. vs. Bay, 200 U. S. 179 (Packets);

The Chattanooga Foundry Co. vs. Atlanta, 203 U. S. 390 (Pipe); this case grew out of the Addyston Pipe case);
Montague vs. Lowry, 193 U. S. 38 (Tile.)

All of these cases were held to be in restraint of competition, and therefore void under the Sherman Act.

3. *The Northern Securities Case*: The method of the combination in this case was different, but in realty that constitutes the sole distinction between it and the Trans-Missouri and the Joint Traffic Cases, for in the Northern Securities Case, as in the former, the owners of the Great Northern and the Northern Pacific railroads made a combination in restraint of interstate trade. Each of these railroads was a common carrier, bound to carry for all alike and at reasonable prices, and each was the competitor of the other for a large amount of the freight in the Northwestern portion of the country.

The Supreme Court in the Pearsall case had held that to combine the stock of the two competing railroads would be illegal.

The stockholders did attempt to do so through a New Jersey corporation and the Court held a New Jersey corporation could not authorize them to violate a Federal law.

In our case we do not rely on the New Jersey corporation to give us rights we did not possess before or to authorize us to violate a Federal Law.

We use the New Jersey Standard Oil corporation merely as a convenient method of holding our property.

The properties we conveyed to the New Jersey Standard Oil Co. were *non-competitive*—were all engaged by individuals in private trade. These same individuals owned the stock in the New Jersey Standard Oil Co.

Admittedly, in the Northern Securities Case, the two railoads had the monopoly of interstate traffic for the Northwest and were fierce competitors.

The Northern Securities Company was organized under the laws of New Jersey after the Sherman Act was passed, and was organized for the sole purpose of allowing the conspirators—Morgan, Hill, Harriman, *et al.,* who controlled the stock in both competing railroads—to use the corporate organization as the method of perfecting their combination to prevent competition between the two railroads and thus restrict interstate trade.

They pleaded this State charter as an excuse, if not a justification for the unlawful joinder of the two competing roads.

Each of the railroads was a public highway and a common carrier of interstate traffic, and thus was practically subject to the regulations of the State and General Governments in a manner in which the private corporations engaged in private enterprises in interstate trade are not subject.

The Great Northern and the Northern Securities Company were corporations *quasi*-public and performing public duties and having public functions, and neither of them could combine with the other as to those public duties and those public functions.

The rules governing agreements between such railroad companies in reference to restraint of trade are different (as was pointed out in the *Baltimore Gas Case,* 130 U. S. 408), from that governing individuals. See, also:

U. S. vs. Knight & Co., 156 U. S. 1;
U. S. vs. Trans-Missouri, 166 U. S. 321.

The individual or private corporation, even if engaged in interstate traffic, may, at any time, stop his business; may sell or refuse to sell to any person he chooses; may fix whatever price he chooses for his goods; whereas, the railroad companies cannot stop their operations, cannot fix whatever price they choose and cannot refuse to carry for any one.

See, also opinion of Judge Shiras in court below, cited with approval by the Supreme Court in the *Trans-Missouri Case,* 166 U. S. 337.

The following remarks by Mr. Justice Brewer and Mr. Justice Harlan in the Northern Securities Case, and by Mr. Justice Peckham in the Joint Traffic and the Trans-Missouri cases point these comments. Mr. Justice Brewer, after asserting that any individual had the right to purchase the control of the Great Northern and the Northern Pacific Railroad Co. if he could, said that the facts were:

> "There was a combination by *several individuals,* separately owning stocks in two competing railroad companies to place the control of both in a single corporation. The purpose to combine, and, by combination, destroy competition, existed before the organization of the corporation, the Securities Company."

This corporation was merely a means of combining the two separate and competing railroad properties and thereby

restraining trade by destroying competition, just as much as if the two railroads had appointed a committee to regulate rates.

Mr. Justice Harlan, among other things, in the Northern Securities case, called attention to the fact that railroad companies operate (p. 353)

> "Public highways established primarily for the convenience of the people, and, therefore, are subject to governmental control and regulation."

On page 335, Mr. Justice Harlan said:

> "What the Government particularly complains of, indeed all it complains of here, is the existence of a combination among the *stockholders* of *competing* railroad companies which, in violation of the Act of Congress, restrain interstate an international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of the State corporation, can it in reason be said that such a combination is not embraced by the very terms of the anti-trust act."

Mr. Justice Brewer, who was one of the majority, also said that the Sherman act

> "is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen * * * I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard whole-

some business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation."

In the *Trans-Missouri case,* 166 U. S. 321, Mr. Justice Peckham considered the difference between a public corporation, such as railroad companies, and a private corporation, which are really trading companies, and on page 318, 321, he, *inter alia,* said:

"The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and must do so at the same price for the same service, and the price must be reasonable, and it cannot, at its will, discontinue its business."

Again, on page 325, he said:

"It is entirely appropriate generally to subject corporations or persons engaged in trade or manufacturing to different rules from those applicable to railroads in their transportation business." ,

Again on page 333, the learned Justice said, speaking of the railroad corporations and the business of such corporations:

"It is of such a public nature that it may well be doubted, to say the least, whether any contract which im-

poses any restraint upon its business would not be prejudicial to the public interests."

Again on page 333, the Court said:

"It was said in *Gibbs vs. Baltimore Gas Company,* 130 U. S., 396, at page 408, by Mr. Chief Justice Fuller as follows: 'The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbiextended so as to interfere with the freedom of a contract, *Printing & Registering Co. vs. Sampson,* L. R. 19 Eq. 462, yet in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however, partial, because in contravention trarily of public policy."

The above extract from the opinion of the court is made for the purpose of showing the difference which exists between a private and a public corporation,—that kind of a public corporation which, while doing business for remuneration, is yet so connected in interest with the public as to give a public character to its business—and it is seen that while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtained in the case of public corporations like those of railroads where it well may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests.

This distinction is also made by Judge Sanborn in *Whitwell vs. Continental Tobacco Co.,* 125 Fed. 460, 461; and in *Deuber Watch Co. vs. Howard Watch Co.,* 66 Fed. 637, 644.

Direct, Immediate, Substantial.

4. Only combinations which directly and immediately and necessarily and substantially restrain interstate trade or commerce are within the provisions of the Sherman Act. Even attempted state monopolies, as in the Sugar case, or combinations restricting the liberty of the individuals as to local state traffic, and which only indirectly affect interstate trade, are not within the act.

U. S. vs. Knight & Co., 156 U. S. 1;
Hopkins vs. U. S., 171 U. S. 579;
Anderson vs. U. S., 171 U. S. 604;
The Cincinnati Co. vs. Bay, 200 U. S. 179.

5. Another class of cases is where there was a direct combination to restrain by force persons engaged in interstate trade or commerce, and these were held to contravene the Sherman Act.

In re Debs, 158 U. S. 564;(Though this case was not by the Supreme Court of the United States decided strictly under the Sherman Act).

Loewe vs. Lawlor, 208 U. S. 275 (the Hatters case).

6. Then comes a class of cases in reference to the enforcement by combinations of contracts of sale, and here the distinction is that if the sale (as in the Con-

nelly case) was only an incident of the combination, and the suit to maintain it did not require the proof of the combination, and the plaintiff's right to recover did not lay through the combination; that the combination might recover. But if, on the other hand (as in the Paper Case) the action involved the combination itself and it became part of the plaintiff's case and in order to recover the plaintiff had to prove the combination, then there could be no recovery.

Connelly vs. Union Sewer Pipe Company, 184 U. S. 540;

Continental Wall Paper Co. vs. Voit, 212 U. S. 227.

7. There are also cases where (as in the Harrow Case), the exclusive feature was granted by patents, and the contract was in pursuance of the exclusive right given by patents; also other cases in which it was held that a contract by which A sold to B a certain business, and covenanted not to engage in that business for a certain length of time, was good, though it was admitted that this covenant was in restraint of competition and thereby in restraint of trade, yet it was not in contravention of the Sherman Act.

Bement vs. National Harrow Co., 186 U. S. 70;

Field vs. Barber Asphalt Co., 194 U. S. 618;

Board of Trade vs. Chicago Grain & Stock Co., 198 U. S. 236.

This consideration will emphasize the point above made, to-wit: that the case at bar is not included in or ruled by or like unto any one of the cases above cited.

The Tobacco Case.

United States vs. American Tobacco Company, 164 Fed. Rep., 701:

This case was decided by a divided court, Judge Ward dissenting. The distinction between the Tobacco case and the one at bar as to the facts is marked. In the Tobacco case, Judge Lacombe said (p. 702):

> "The formation of the original American Tobacco Company which ante-dated the Sherman Act may be disregarded. But the present American Tobacco Company was formed by *a subsequent merger* of the original company with the Continental Tobacco Company and the Consolidated Tobacco Company, and when that merger became complete, two of its *existing competitors* in the tobacco business were eliminated."

Judge Coxe, in his opinion, said (p. 704):

> "The tobacco trust, so-called, consists of over sixty corporations which, since January, 1890, have been united into a gigantic combination which controls a greater preponderating proportion of the tobacco business in the United States in each and all of its branches, in some branches the volume being as high as 95 per cent. Prior to their absorption, many of these corporations had been active competitors in interstate and foreign commerce. * * * We are not dealing with these companies as they existed prior to 1890, but with the consolidated unit controlling a preponderating proportion of the tobacco business in its most minute details. Prior to that date, the manufacturing companies, the purchasers, the distributors and the selling companies were each

and all operating independently, and tobacco products were being transported back and forth to every State of the Union and to foreign countries. Since 1890, this vast interstate and foreign trade which was formerly carried on by this large number of competing companies and individuals is now carried on by one combination." Judge Noyes in his opinion (p. 718), said:

"In looking through the record for a combination which restricts competition, it is not necessary to go far. The defendants in their own statement of that which they have done present such a combination. In their brief, page 132, they say that their actions fall into two classes of which the following is the first:

'The consolidation of interests more or less sharply competitive through the formation of a corporation and the transfer to it of the respective properties and business of such competitors."

It is obvious then that there were two controlling propositions in the case:

(a) The combination was of sharply competitive corporations engaged in the same business; and,

(b) That combination was made after and not before the Sherman Act was passed.

Perhaps some of the language, especially of Judge Noyes, might seem to say that if a corporation became large enough to do a large percentage of the business in any common trade, and thereby was enable to fix prices in the same, it would be in contravention to the Sherman Act, but this can hardly be said to be the real meaning of the opinions of

any one of the three Judges because all of them seem to emphasize the fact and rely upon it that competitive corporations in the same business after the Act of 1890 were combined, and thus competition was destroyed.

The case, then, is on its facts, markedly different from the one at bar because there has been here no combination of competitive interests after the Sherman Act was passed.

Judge Coxe said (p. 709):

"The statute was not intended to strike down enterprises or to prevent the restraint of trade by destroying it. Many large merchants find it profitable to conduct their business through a chain of stores, and it has never been held that the mere fact that a business is large and is extended over a wide territory renders its promoters amenable to the statute. Success is not a crime * * * I cannot believe that the fact that a corporation, assuming it to have combined with others to restrain trade, invests its money in the business of another corporation engaged in selling its goods and those of others fairly to the public, is, of itself, sufficient to convict the latter corporation of entering into a conspiracy to monopolize interstate commerce. * * * It is true that the cigar stores Company has been energetically and perhaps aggressively managed; it is true that a part of the business thus built up would have been done by others had the company not been formed, but this is true of every large and successful business. Prosperity is the premium which has always been awarded to earnest and intelligent endeavor. The statute was never intended to punish success or reward incompetency."

Judge Noyes (p. 721), in his opinion said:

"Following the authorities, the necessary result is that the defendants, in possessing the power of control over the tobacco market, monopolize interstate trade and commerce within the meaning and in violation of the Second Section of the statute. And yet, in view of the possible results from this interpretation of the statute, I could only with hesitation unqualifiedly adopt it. An aggregation of capital or property with power to control the market for a product might be brought about by lawful means without the element of combination, and might carry on its operations without the element of oppression. If the mere possession of power is the test of legality, then the inquiry in that case, as in any other case, would merely relate to the present status of the aggregation. What has it power to do—without regard to its past history or its present methods? Thus a result might be declared unlawful which was obtained by lawful means; an aggregation of capital criminal which actually operated to the public benefit. The law that illegality depends wholly upon the power of performance may be settled, but it was not settled when the tendency towards the unification of interest was so marked as at the present time. It may be that now in applying the Second Section of the Statute, performance as well as power of performance should be considered; that the elements of oppression and coercion should be shown to exist to establish an unlawful monopoly."

Judge Ward, in his dissent, said (726):

"The prohibition is against combinations whose purpose is to restrain trade. Such a combination is within the Act even if it fail to do so; while one whose purpose is not to restrain trade is not within the act even

if it incidentally does so. Intention is of prime importance because the acts prohibited are made crimes. * * * The purpose of the combination was not to restrain trade or prevent competition although competition was incidentally prevented, but by intelligent economies to increase the volume and the profits of the business in which the parties were engaged. No agreements were entered into as in many of the decided cases that operated directly on interstate commerce through common carriers by maintaining rates or preventing competition, like the *United States vs. Trans-Missouri Freight Ass'n., United States vs. Joint Traffic Ass'n.,* and *Northern Securities vs. United States,* or which limited the output of manufacturers or regulated the prices at or the territory within which their output should be sold throughout the United States, as in the *Addyston Pipe, Montague vs. Lowry, Swift & Company vs. United States;* or which sought to prevent any interstate commerce at all in the goods in question, as in *Loewe vs. Lawlor* * * * It remains to inquire whether the American Tobacco Company and its controlled companies constitute a monopoly of or attempt to monopolize a part of the foreign commerce or commerce between the States, under the Second Section of the Sherman Act.

As this Section prohibits a monopoly of or attempt to monopolize any part of such commerce, it cannot be literally construed. So applied, the act would prohibit commerce altogether. The first and second sections must be read together, and, I think mean the same thing; the second adding nothing except to extend the prohibition to individuals who, without combination, monopolize or attempt to monopolize. It must be understood to prohibit monopolies or attempts to monopolize brought about by the unlawful means contemplated in the first

section, viz, the purpose to restrain trade by preventing competition and preventing others from participating in it. The third section of the Act bears on this con-

The Third Section of the Act bears on this construction because it does not mention monopolies or attempt to monopolize in the Territories or District of Columbia, where the jurisdiction of the United States is supreme in all things, and it can hardly be that Congress intended to declare innocent acts committed within them, which it pronounces crimes if committed in the States. The purposes of the defendants should not be made to depend upon occasional illegal or oppressive acts or letters, but must be collected from their conduct as a whole."

If the decision in this Tobacco Case should be held to mean that the formation of the large corporation engaged in interstate trade which, by legitimate means, gains the power to temporarily fix prices is a violation of the Sherman Act, such result would be directly contrary to the decision of the Supreme Court in the *United States Joint Traffic Association,* 171 U. S. 576, wherein Mr. Justice Peckham, speaking for the Court, replied to such an argument by saying:

"We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership."

MARKED DIFFERENCES BETWEEN THESE CITED CASES AND THE PRESENT CASE.

In the case at bar the joint ownership was formed *long prior* to the Sherman Act, and the properties were owned long prior to that date (with trivial exceptions noted.) The combination was simply and only a joint ownership of property by a number of individuals. There was no covenant between them not to compete; there was no covenant by which a standard price could be fixed; there was no covenant for a division of territory; and no agreement to prevent others from joining in the trade; it was simply and only the joint ownership of different parcels of property used in the same business where the economic laws governing such property, *and the use of the same* would, as a rule of trade, dictate to a large extent the modes of carrying on the business.

At the time that the Sherman Act was passed none of these properties were competitive. That they have not since become competitive we consider and prove elsewhere. Since the passage of the Sherman Act, the only properties purchased by these joint owners are given in our brief on facts.

The properties being jointly owned and in a common interest, were not required by any law to compete with each other any more than the members of a partnership could be required so to do. The Sherman Act did not compel such competition. The growth of the group of non-competing properties owned in 1890 has been the natural, healthy inevitable result of an unique business carried on with great skill and attention to details, where every economic rule was adopted and carried out which enabled the joint owners of the property to utilize the same not only to the great benefit of the

public, but to the legitimate enrichment of themselves. The joint group did engage in a war of competition, but its warfare, and its means of warfare, and the weapons that it used, were not different from or other than those used by its adversaries when opportunity offered.

Prices were, from time to time cut, but generally to meet the tactics of the adversary. The group endeavored to thoroughly understand the oil business in all its branches, including the customers and tradesmen of its adversaries, as do all business men in different lines of business in which each is engaged. The group did endeavor to attract to it customers of the adversaries, as did the adversaries that of the group.

These defendants were not *quasi* public corporations like railroads owing peculiar duties to the public but private traders.

The difference between the law governing and the rights of the two classes, as we have shown, are marked and broad.

THE TRUST AGREEMENT OF 1882.

Position of the Government.

As stated by Mr. Kellogg, the senior counsel for the Government, its case is as follows:

First. The Trust Agreement of 1879 (Vilas, Keith & Chester) and the Trust Agreement of 1882—but especially the Trust Agreement of 1882—are both void at common law as being,

(a) In restraint of competition in trade and as tending to a monopoly;

(b) Against the policy of the State of Ohio; and

(c) Against the Federal common law:

Second. This Trust Agreement of 1882 under the control of the seven individual defendants, was practically continued until 1899 because the dissolution of the Trust in 1892 was by such method as to enable the seven individuals still to control properties:

Third. When these properties in 1899 were conveyed to the Standard Oil Company of New Jersey, this also was a continuation of the Trust, and in itself was, in addition, the creation of a combination in restraint of trade and tending to a monopoly:

Fourth. That under the corporate existence, this still continues:

In this mode of reasoning, it is apparent that the whole argument rests on two propositions:

(1) Were the Trust Agreements of 1879 and 1882 void at common law and under the Federal common law?

(2) Was the conveyance to the Standard Oil Company of New Jersey in 1899 a restraint of trade and a monopoly in violation of the Sherman Act?

First. Neither of the Trust Agreements contained any covenant or contract to avoid competition; to fix prices; to

restrain trade, or things tending to create a monopoly. Referring especially to the Trust Agreement of 1882 because that is the one that is chiefly attacked, a close examination of it will show that it was nothing but the conveyance to seven individual trustees of non-competitive property of which the vendors were the joint owners, and that this property was all parts of a whole, with no separate and individual independent interests in any one of the vendors as distinguished from any other. The power given to the trustees was to manage this joint property in the business in which it was engaged. It was to be managed for the benefit of the *cestuis que trustent.* The trustees held the legal title; the *cestuis que trustent* the equitable; and thus the *cestuis que trustent* were, in equity, the real owners, and the property was handled for their benefit. They could jointly hold the legal title and the equitable title in their own names, and manage this property. There has been and can be no good reason shown why these joint owners of the non-competitive parcels of property might not authorize trustees to do with it that which the real owners of it might themselves have done, the title still standing in their names.

Second. Each citizen of the United States has the right to acquire and use property, to hold it in whatever way he sees fit. Under the common law, he may have held it with others in joint tenancy or as tenants in common or as copartners.

At common law, he could have directly held the legal title and equitable title both, or he could have vested the legal title in trustees and owned the equitable interest as *cestui que trust.* There was and is at common law no limitation on the creation of these trusts except the one that the interests therein shall not remain contingent or shift after the period of a life or lives in being and twenty-one years.

It is certain that the life of this agreement was expressly limited to that period and that it was subject and was made subject by its terms to a revocation of it by the *cestui que trustent.*

THIRD. The trustees did not acquire nor did the vendors of the property acquire by conveying legal title to the trustees any other or additional power in reference to the handling of the property than that which the individual owners of it had prior to the conveyance. The conveyance to the trustees to hold the legal title and manage for the benefit of the *cestuis que trustent* was no more a combination in restraint of trade than if the different vendors who jointly held and owned the property had themselves continued to use it, and in the same business and in the same way that the trustees had the power to do. It no more created a monopoly or tended to create a monopoly than would the same property in the hands of the original owners have created or tended to create. The trustees had no other or additional power or advantage in dealing with the property than had the original owners.

FOURTH. Was this a conveyance, then, void at common law?

(a) No authority is cited to support that. The right of the individual to hold his property in whatever shape he sees fit is one of his constitutional rights, and while the methods and modes of the acquisition and control of real and personal property are subject to the laws of the state, yet no state can deny to the citizen of the United States his right to liberty, his right to acquire and hold and use in whatever way he pleases his property, provided that he uses his property in a lawful manner and for lawful purposes. The English and

American books are full of cases defining and limiting and supporting Trust Agreements, and defining rights of the legal title and the equitable title; and so far as I know, within the rule above stated as to perpetuity, the right of the individual to so use his property is not denied.

This agreement, therefore, was not void at common law.

See quite a similar case on the question of perpetuities in the Supreme Court of Massachusetts:

Howe vs. Morse et al., 174 Mass. 491;
Gray's Rule Against Perpetuities, Sec. 411.

(b) The Supreme Court of Ohio in the case of the *Attorney General vs. The Standard Oil Company held* that the agreement was contrary to the policy of the State of Ohio, but the State of Ohio never pretended that the title to the property did not vest in the trustees, or that the property itself conveyed was forfeited, or that the parties who conveyed the title to the trustees did not still own the property. The question of the validity of the Trust Agreement of 1882 was not really in the case cited, and while the Federal courts will pay great respect to the decision that the Supreme Court of Ohio would give, and should so pay, yet it is contended that if the policy of the State of Ohio forbids the creation of this Trust Agreement, that policy is contrary to the common law as it existed in England, and has been generally recognized in the States of this country.

(c) Was there a Federal common law which denounced this Trust Agreement as in restraint of trade

and as tending to a monopoly? We answer no; and while this is more fully treated in another portion of this Brief, it may not be out of place here to briefly state the reasoning.

Whether or not there was in 1882 a Federal common law in existence as to interstate trade under the decision of the Western Union Telegraph case contrasted with the case of the Willamette Bridge and the subsequent case of *North Shore Co. vs. Nicomen Boom Co.*, 212 U. S. 412, may be a matter of grave doubt so far as the exact question in this case is concerned; but certain it is that at that time there was no Federal common law which did or could regulate the acquisition and the use of manufacturing or producing properties in the States of Ohio, Pennsylvania or other States; and this because these manufacturing or producing properties never entered into the channel of interstate trade, and were not within the jurisdiction of Congress as was fully determined in the case of *Kidd vs. Pearson* and the *Knight & Company Case.*

There could be, then, no Federal common law which was broader than Congressional power; that is, the courts could not declare the existence of a Federal common law which Congress itself could not enact by statute, and Congress itself could not exact by statute, regulations with reference to the acquisition and use of properties in the different States.

Fifth. In this case, these properties and the rights of the trustees to hold them are not directly involved because the only thing that has entered into interstate commerce is the crude and refined oil; the refineries and producing oil wells and pipe lines have never entered into interstate commerce. They are all state constructions and owned under the

laws of the different states in which they are located. Now admitting, *arguendo,* that the Trust Agreement of 1882 was against the policy of the State of Ohio, Ohio never did declare that the title to the property was in any way vitiated or taken away from the owners of the property by this conveyance in 1882. There never has been a forfeiture declared or even suggested. All that enters into interstate trade is either the crude oil produced at the wells or the refined oil and its preducts, which, in part and in great part, depends upon the use of the producing oil wells and the refineries. No one supposes, even if A B own the title to the refinery or a steel mill or other manufacturing property, that because his title might be defective to the real estate that he did not have title to the things produced by the use of it; as, for example, refined oil and its products and steel rails, etc. Especially is this true as to the Federal law. The United States does not examine the title and the methods by which the property put into interstate channels is acquired. It does not demand of the person who is engaged in interstate trade that he show the abstract of title to the things which he is transferring. Indeed, it does not concern itself with the title at all, and the regulations which Congress may make as to interstate trade do not, as the *Knight & Company* case fully show, extend to the question of the acquisition and ownership of the real estate and property located in the states, because that is not part of commerce between the states.

It is submitted that these views conclusively show that there was no Federal common law in 1879 or in 1882 which these agreements violated; and that this is entirely consistent with the *Western Union Telegraph Case,* and is directly and affirmatively sustained by the *Williamette Bridge Case,* and that class of cases, as well as by *North Shore Co. vs. Nicomen Boom,* 212 U. S. 412.

If the Trust Agreement of 1882 was not void under any Federal common law, the continuance of it until 1899 (which we deny), was not illegal; and when, in 1899, the joint owners of all these properties saw fit to convey them to a corporation of the State of New Jersey, and in this manner to control and use and regulate them, this was not of itself a restraint of trade or monopoly under the Sherman Act. The case bears no relation whatever to the Northern Securities Case which, in brief, was that certain stockholders of competing railroads, who could not unite their stock to prevent competition between the roads, obtained a charter in New Jersey to authorize them so to do; and, of course, the courts held that these people could not cite a charter of New Jersey as authorizing them to violate the laws of the United States, and especially the Sherman Act.

But in our case, the properties that were conveyed were non-competitive. They were properties jointly used and lawfully used in a lawful business. The owners of the property used the New Jersey corporation as a method or mode of holding and controlling and using the properties. This holding and owning by the New Jersey corporation did not give to the owners of the property any additional rights as was claimed in the Northern Securities Case. Indeed the Standard Oil Company of New Jersey acquired its rights from the individual owners of these properties, and these individual owners did not, by the conveyance to the New Jersey corporation, acquire any additional rights except as to the methods of holding and using and managing the property.

Here again the rights of the citizens of the United States and the method or the manner in which they may jointly hold and use property are asserted. If the laws of New Jersey authorized them through the method of a corporation to so hold and use these non-competitive groups of property, it is inconceivable that the conveyance of the property to the New

Jersey corporation made a combination in restraint of trade, or as tending to a monopoly under the Sherman Act. If the joint ownership itself of the real estate and the other property and the use of them jointly by the individuals was not of itself a restraint of trade and as tending to a monopoly in violation of the Sherman Act, if these owners had still continued to hold the property in their own names, surely their conveyance to the New Jersey corporation did not make it a combination in restraint of trade or a monopoly.

WHEN THE TRUST AGREEMENT WAS DISSOLVED IN 1892, THERE WAS NO SEPARATE CONVEYANCE BY THE TRUSTEES TO ANY ONE OF THE CESTUIS QUE TRUSTENT OF ANY PARTICULAR THING; I. E., PARTICULAR PIECE OF PROPERTY. ALL OF THE STOCKHOLDERS OR RATHER THE CESTUIS QUE TRUSTENT UNDER THE TRUST AGREEMENT OF 1882 STILL JOINTLY OWNED, AS THEY DID BEFORE, ALL THE PROPERTY; AND IT WAS THIS JOINTLY OWNED PROPERTY WHICH WAS CONVEYED IN 1899 TO THE STANDARD OIL COMPANY OF NEW JERSEY. THIS PROPERTY WAS NOT COMPETITIVE BEFORE THE DISSOLUTION, AND THE PROOF IS OVERWHELMING THAT THERE WAS NO CHANGE IN THE MÉTHOD OF THE MANAGEMENT OF THE PROPERTY, AND THIS THE PETITION IN EQUITY ASSERTS AND RE-ASSERTS.

Thus the Petition in this case alleges (p. 66) that the liquidating Trustees named in the resolution of 1892 dissolving the trust were the same as the trustees under the Agreement of 1882, and that, with the exception of $1,579,400 worth of property, the trustees, after the dissolution in 1892, continued to unlawfully hold and control all of said property, and that none of it was returned to the original owners; and that (p. 69)

> "said individual defendants continued their control and *joint ownership* and the conspiracy to control the business of said separate corporations;"

and on page 68, the dissolution is said to be a *pretended dissolution;* and on page 69, is the following averment:

> "That during the said time from 1892 down to January, 1899, and notwithstanding the said decision declaring the said trust agreement void and ousting the Standard Oil Company of Ohio from the right to make said agreement and to perform the same, and notwithstanding the pretended dissolution of said trust, the individual defendants in this action, who were liquidating trustees, *did continue to manage the affairs of all said separate corporations so engaged in said business in the same manner as they had theretofore,* under and by virtue of the terms of said trust agreement, and in violation of law and continued to elect and did elect and designate the directors, managers, and officers of all of said corporations, for the purposes and with the effect of suppressing and restraining commerce," etc.

Again on page 70, the Petition alleges that in 1899

"in continuation"

of the original conspiracy and for the purpose of making that more effective, in the month of January, 1899, the individual defendants caused the charter of the New Jersey corporation to be amended and (p. 72),

> "The object of forming said corporation was to acquire the stock and control of each and all of said corporations and other corporations engaged in like business, and for the purpose of operating and controlling said corporations and other corporations in the same manner as had been done by the individual defendants through said trust agreement."

The allegation then follows that the individual defendants controlled the New Jersey corporation in the same man-

ner that they did under the trust agreement of 1882, and used the New Jersey corporation as one of the means and methods of carrying out the original conspiracy. On pages 78 and 79 it was distinctly alleged that the Standard Oil Company of New Jersey was engaged in producing, purchasing and transporting petroleum in different ways and selling it (p. 79):

> "The said individual defendants, through the said Standard Oil Trust and Standard Oil Company and their said various subsidiary corporations, have, therefore, during each and all of the years since the organization of said Standard Oil Trust in 1882 and of said Standard Oil Company in 1899, been engaged in interstate commerce."

For the Government now to claim that there was a break in this continuity of ownership and control, and that after the dissolution of 1892 there was a distinct and independent ownership of the different companies, and that the different companies became competitive to each other, is utterly inconsistent with their own petition and their allegation in the petition as to what their case is.

The testimony of Mr. John D. Rockefeller (Vol. 16, pp. 3190-3193) is attempted to be used to prove that (which proof would directly contradict the allegations of the Government in its petition) after the dissolution the companies were independent and competing; but if the testimony of Mr. Rockefeller is read as a whole, and especially his testimony on page 3191, etc., down to page 3193, it will be seen that what he testified to was what was a fact, and that was that while all these *cestuis que trustent,* under the agreement of 1889, were still the joint owners of all these different properties (p. 3193) yet, as a fact in one sense, each one of the different corporations in each one of the different States

did do its separate and independent business, as for example, the refining of oil and the sale of its own product.

Thus Mr. Rockefeller testified (p. 3193), as follows:

"I suppose that as a matter of fact these companies, all being owned by the same people, would not be managing their separate businesses, except in the way that would be most productive for all the separate businesses. * * * Well, each company does continue to manage its own business to-day, *as I understand it.* * * If a company is organized under the laws of the State of Ohio, it is an independent corporation; and that if it is organized to conduct that business that is its function, that is what it is expected to do."

Again, on p. 3194, he said:

"The control of those different companies in each case was, as I have stated, by the stock holdings, and those companies were *then, as now,* in this common ownership. * * *

Q. After the dissolution the ownership was not the same as before the dissolution, was it?

A. There was no change of interest of the parties concerned; that is, every man had just the precise proportion of all this business that he had had before, and so fast as these trust certificates were cancelled, then, instead of having one certificate to represent that same precise interest, he had an interest in each one of those companies."

It is true, as Mr. Rockefeller testified, that there never was any agreement between the joint owners of the property; that, for example, the Standard Oil Company of Ohio should not sell its oil within a territory, say of the Standard Oil

Company of Kentucky, and in that sense it is still true, but economic laws really govern that and define the competitive territory for each corporation.

This attempt, then, to vary the charges in the Bill and to attempt by evident misapprehension of Mr. Rockefeller's testimony to prove the existence of distinct and independent and competing properties after 1892 must utterly fail.

Indeed, under the Sherman Act, as well as at common law, there never was any doubt that two or more competitors in private trade (not in a *quasi* public business) may join as partners together to carry on for the future the trade as partners. Competitors may become partners and join to carry on, as partners, the future trade. What the law denounces is that the independent and competing traders make private agreements resolving not to compete, and fixing artificial prices. It does not prevent or hinder the competing traders joining together as partners and going ahead as a firm.

This is stated in a number of cases, among others the following:

Smiley vs. Kansas, 136 U. S. 447;
Chesapeake Co. vs. U. S., 115 Fed. Rep., 610;
Oakdale Mfg. Co. vs. Garst, 18 R. I., 404;
Deuber Watch Co. vs. Howard Watch Co., 66 Fed., 637.

CONCLUSIONS ON THE WHOLE CASE.

(1). We respectfully submit that on the whole case the Governments' contention has broken down and utterly failed. It bases its whole case on the illegality of the Agreement of 1882, and the continuation of the same under the charter of the Standard Oil Company of New Jersey of

1899, and, as we have heretofore shown, the Agreement of 1882 was not unlawful under any Federal common law, and certainly not under any Congressional legislation, and also certainly not even under the Sherman Act, because it was the conveying to the trustees of non-competitive property.

(2). The attempt at the close of this case to allege that these non-competitive properties after the dissolution of 1892 became competitive and distinct and independent, and that therefore the conveying of them to the Standard Oil Company of New Jersey was a combination in restraint of trade and a monopoly, has been fully answered by showing—

(a). That the claim itself is directly contrary to the whole theory of the Government's case as set forth in its petition, and is a direct contradiction of many of the averments therein; and,

(b). That the testimony of Mr. Rockefeller, which is the only testimony cited to that effect, properly construed, means no such thing as the Government now alleges. The inference the Government now alleges was contradicted by all the evidence in the case as to the period from 1892 down to and including 1899.

(3). The defendants further insist that under all the proof in this case, the Government has utterly failed to show that in November, 1906, when the Petition was filed, the defendants were doing anything in violation of the provisions of the Sherman Act, and that the Government's case is not maintained even if the Government had proven (which we say it has not) that we did at some prior time to November, 1906, violate the Sherman Act. There is no presumption at law that because you do an unlawful thing, say in 1900, that you are still continuing to do that in 1906. The Government

must itself prove that you are doing the alleged unlawful things in 1906, and this it has failed to do.

(4). All the matters and things prior to the Sherman Act are irrelevant and immaterial, because no one of them constituted any breach of the Federal law then in existence, and the Government's case here must be made out solely and only under the Federal law.

(5). We respectfully submit that all the evidence in the case, taken together, proves that what is called the "Standard Oil Company" is the natural and possibly the inevitable evolution of a unique and hazardous business like that of crude petroleum and its refined products. It was absolutely necessary for some one or more large corporations or wealthy individuals to come together to provide the pipe lines and reservoirs, etc., to care for and store the oil and to engage in a large export business and a large refining business, and this is what the defendants have done and successfully done.

THE GOVERNMENT HAS UTTERLY FAILED TO SHOW THAT WE WERE, WHEN THE PETITION WAS FILED, DOING THINGS WHICH WERE VIOLATIONS OF THE SHERMAN ACT.

RE-STATEMENT OF MOST MATERIAL POINTS.

From all these things, we gather the following as important in directing our examination of the facts:

First. To prove as against private traders a restraint of trade under Section One of the Sherman Act, you must prove an actual restraint, not a mere attempt to restrain.

(*The rule is probably different as to quasi public corporations, such as railroads.*) That restraint must be by contract or combination or conspiracy. It must be of interstate trade and must be direct, immediate and substantial. The mere restraint which necessarily follows from the lawful gains of competition is not a violation of the Sherman Act, for if so, competition would be killed and the purpose of the Sherman Act defeated.

Second. To prove a monopoly, you must prove that the individual or combination gained the control of interstate trade in oil, or attempted to gain the same by unlawful means. If such gain was made or attempted to be made by lawful means, the law allows it and the very purpose of the Sherman Act was to protect it and further it, for it made competition free. As bearing on the question of the lawfulness of the means employed in gaining control of the oil trade, one has to take into view the economic situation, and here it will be seen that the evolution of such a combination as the Standard Oil Company was a necessary and inevitable consequence of the laws of trade as applied to such a unique and unparalleled industry as the production and refining and sale of crude oil and its products.

See our brief on facts.

Third. Any competitor in trade may buy the business of another or others or as many as he can, and for the express purpose of getting rid of their competition. If by the lawful means of competition he compels them to sell to him, it is legitimate gain.

Competition knows no restriction except that the means used shall be lawful. The question of whether it is fair or

unfair, or due or undue, or reasonable or unreasonable has nothing whatever to do with it. The sole test is: Were the means used in competition lawful.

Fourth. And the test of lawfulness in the interstate trade is not the State law, statutory or common, but it is the Federal law, and it is the Federal law within the commerce clause of the Constitution. To point out that any given thing done by the defendants in the gaining of the so-called monopoly was unlawful and criminal, the Government must show some Federal law which made it so. The thing charged in this petition is a crime. There are no crimes under the Federal law except that which Congress declares, and therefore only Congressional Federal legislation can be relied upon by the Government in proof that the defendants had committed a crime in attempting a monopoly prior to the Sherman Act of 1890.

The individual defendants are not only citizens of the United States, but they are citizens of the State in which they reside. Each sovereign has a distinct and independent jurisdiction, and neither relies upon nor carries out the laws of the other. The action of these citizens of the United States in interstate trade prior to 1880 and subsequently must be tested by Federal laws; and it is wholly indifferent that their actions might have been in conflict with any of the laws of any of the States.

The rights of the individual as a citizen of the United States to fully engage in the interstate trade are granted to him by the Constitution. It has no Constitutional restrictions and it can be restrained only by Congressional action; and there was no such Congressional action prior to 1890 when the Sherman Act was passed. The Federal courts cannot of

themselves restrict that liberty except as the result of Congressional action.

Fifth. Certain important things should not be overlooked:

(a) That the point of time we are inquiring about is November 15th, 1906, when the Petition was filed:

(b) That in this mode of proceeding in equity the sole question is, Were the defendants violating the Sherman Act on November 15th, 1906?

(c) Prior violations, if any, are immaterial: alleged improper acquisitions of refineries are not involved here: alleged prior acceptances of rebates are not involved here:

(d) The defendants are private citizens engaged in a private enterprise where their rights and privileges are different and otherwise from that of railroad corporations:

(e) The defendants deal solely in crude petroleum and its products. This case does not involve any question as to the acquisition or the use of properties located in any of the states:

(f) The only question here is as to the interstate trade in oil and its products. The intrastate trade, however acquired and however carried on, is immaterial:

(g) Alleged examples of unreasonable or even illegal means used in competition prior to November 15th, 1906, or of the acceptance of rebates prior to November, 1906, are irrelevant, unless the unlawful things be shown to have actively continued when the petition in this case was filed.

It was perfectly lawful, indeed praiseworthy, in 1862, for John D. Rockefeller and each one of his six associates who subsequently joined him, to do separately and jointly the following things:

(a) Each to enter into and engage in interstate and foreign trade in oil and its products:

(b) Each to combine with one or more of the others and with corporations to enter into and engage in such trade:

(c) Each to seek to gain for himself and all for themselves in the legitimate and lawful extension of their business so much of the trade as they could. No law, either State or Federal, restricted the extent or percentage of their gains of this interstate business:

(d) Each and all might avail himself and themselves of all the methods which the law authorizes, in part creates by statutes, to further this quest for interstate trade; they might form partnerships; they might form trusts; they might form corporations, and use each or all of them in the furtherance of their efforts to gain interstate trade.

Assume, (*arguendo*) that Congress might prohibit corporations or trusts or combines from engaging in interstate trade: it is quite certain that Congress never has done so, and that, as we have seen in the Sherman Act, Congress has, on the contrary, recognized the propriety of combines and corporations and trusts engaging in interstate trade. No one of the seven individual defendants was forbidden by any Federal law to join or create a combination or a corporation or a trust for the purpose of engaging in interstate trade.

Assume (*arguendo*) that Congress might limit the extent to which corporations or trusts or combines or individuals might carry on interstate trade: it is positively certain that Congress never has passed such a law.

(e) Assume (*arguendo*) that some year prior to 1906 the Standard Oil Company after the passage of the Sherman Act attempted to prevent completion of United States Pipe Line, or received preferential rates from some railroads, etc.; yet as none of these things were being done when the Petition was filed, they do not justify the Petition which can and does only ask for the restraint of what was going on when it was filed in November, 1906.

(f) Prior to 1890 the combining to restrain interstate trade was not prohibited by Congress—was not by any Federal law made a crime. The citizen of the United States as such was not by any law forbidden to so combine. There was no law giving the Federal courts power over such contracts, even in restraint of interstate trade. Until 1887, when the interstate commerce act was passed, there was no Federal law forbidding the taking by the citizen of rebates or drawbacks on even interstate shipments, and any citizen of the United States, so far as the Federal laws were concerned, might take all the rebates he could get.

This does not conflict with the *Telegraph Case,* which involved only the duty of a public servant.

(g) A combination prior to 1890 to restrain or monopolize *interstate* trade was not only not a thing forbidden by any act of Congress, but it was not of itself a regulation of commerce, nor did it directly, immediately or substantially affect interstate trade as did the acts done in the Debs case or the Hatters case.

GOVERNED BY THESE RULES, WHAT MUST THE GOVERNMENT SHOW TO PROVE ITS CASE?

The Government, to prove its case, must show—to prove a violation of section 1 of the Sherman act:

(1) That the defendants *combined* or *conspired* to restrain trade in November, 1906, when the petition was filed: not that we did combine and conspire in 1890 or 1900, but that in 1906 we were so doing. The law does not presume you continued to commit a crime. The Government must prove it.

Here the word "combine" or "conspire" means the same, for a combination to do an unlawful thing is a conspiracy. Each necessitates a contract relation, an agreement to restrain.

(2) That the thing done actually did restrain trade, not merely attempted, but actually did *restrain* trade. The mere possession of the *power* to restrain, or the mere *attempt* to restrain, is not a violation of section 1, unless, indeed, you regard all contracts restraining trade as monopolies. In one sense, that may be true, but it is not the sense in which these words are used in section 1 as to private traders.

There is a difference as to *quasi* public corporations.

This is illustrated by Trans-Missouri Freight Ass'n., Joint Traffic Ass'n., Northern Securities Company, Addyston Pipe Combine, all of competing companies.

Addyston Pipe Case, 175 U. S. 237;
Trans-Missouri, 166 U. S. 324;
Joint Traffic, 171 U. S. 570;
E. C. Knight & Company, 156 U. S. 10.

(3) To prove a violation of the second section of the Sherman Act, it must prove, not only that the defendants have for one or more reasons gained a monopoly (using monopoly in its popular sense), of interstate trade that enabled it to exclude others from the trade and to raise and fix prices, but that it gained that power by unlawful means, and was still using those unlawful means when the Petition was filed in 1906. Because we did an unlawful thing in 1900, it by no means follows that we were doing so in 1906.

If the facts show that in competing for the interstate fall trade of 1906, the defendants did gain, say 90 per cent of the trade, and thus for that trade actually could fix prices and exclude others from the trade, and this power was gained by *lawful* means—the lawful award of *competition*—then the possession of that power is not a violation of the Sherman Act.

This must be so—

The purpose of the Sherman Act is to protect trade. The means of doing this, the courts say, is to free competition, and the purpose of the act is to keep competition free. The natural and inevitable result of competition is to award the successful competitor a lawful monopoly of the percentage of trade he has won. To say that the purpose of the act is to further competition and then put the successful competitor in jail, is an absurdity.

(4) If the facts in this case prove (as we are sure they do), an evolution of an infant industry, the character of which absolutely required one or more large organizations with great capital and power to successfully develop it, and that which is commonly called the Standard Oil Company is the result of the evolution, and an eco-

nomic necessity, then even if the Standard Oil Company is the result of the evolution, and an economic necessity, then even if the Standard Oil Company temporarily gains power to fix prices and exclude others from a certain percentage of the trade, it is not the creation of a monopoly forbidden by the Sherman Act.

The Government cannot and does not prove its case by sporadic and occasional acts of excessive competition or of acceptance of rebates or other improper acts or of things done prior to 1906.

It must show an active violation of the Sherman Act when the Petition was filed in November, 1906.

BRIEF ON THE FACTS.

An extended discussion of the evidence will be found in a separately printed brief.

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